

Lady Madonna, Children at Your Feet:
The Criminal Justice System’s
Romanticization of the Parent–Child
Relationship

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ABSTRACT: In February 2007, two teenage brothers were each sentenced to ten years in prison for burglary and animal cruelty after they broke into a community center and killed a puppy by baking it to death in the center’s gas oven.¹ Just one week earlier, a thirty-year-old mother named Amanda Hamm was sentenced for helping her boyfriend kill her three young children. The children drowned after Hamm and her boyfriend intentionally rolled their car into a lake with the children strapped inside. What sentence did Hamm receive for the brutal deaths of these three innocent children? Ten years in prison.²

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1. See D.L. Bennett, *2 Teens Get 10 Years in Tortured Puppy Case*, ATLANTA J.-CONST., Feb. 9, 2007, at 1B.

2. See Kevin McDermott, *Mother’s Sentence in Drownings Sparks Outrage*, ST. LOUIS POST-DISPATCH, Feb. 2, 2007, at A1. This case is a fascinating example of several of the themes discussed in this Article. Both Hamm and her boyfriend were present during the crime, and both were charged with first-degree murder. *Id.* Yet only her boyfriend, who had no biological relationship to the children, was convicted of first-degree murder and sentenced to life in prison. *Id.* Hamm, the children’s parent, was convicted of child endangerment and received just a ten-year sentence, rather than the twenty-year sentence that was available to the court and requested by prosecutors. *Id.* Because of various sentencing credits, she will ultimately serve fewer than five years. *Id.*

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In 2002, approximately sixty-five percent of all murder victims under the age of thirteen were killed by a family member.³ Yet these crimes are not ordinarily the ones that capture public attention; instead, we reserve our greatest outrage for those relatively rare cases where a child is murdered or sexually molested by a sexual-predator stranger.⁴ As a result, we have a tremendous mismatch between perception and reality: we think we are tough on crimes committed against children by passing statutes like Megan's Law, but in practice, we are overlooking the reality that children face the most danger from family members rather than from strangers. As one reporter for the *Washington Post* recently wrote,

People think child homicide is big news, like Adam Walsh or JonBenet Ramsey[,] . . . but they're wrong. Six or seven infants, toddlers or children under the age of 10 are killed by adults in the District [of Columbia] each year, about 1,500 across the country. Most of them, if they make the news at all, are dispatched with paragraphs as short as their lives.⁵

Equally troubling, these cases often do not result in a perpetrator being held accountable by the criminal justice system, particularly when that perpetrator is a parent.⁶

3. See MATTHEW R. DUROSE ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FAMILY VIOLENCE STATISTICS 18 (2005), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fvs.pdf>. Another government source estimates that 1490 children died as the result of abuse or neglect in 2004. See ADMIN. ON CHILDREN, YOUTH & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2004, at xvii (2004), available at <http://www.acf.dhhs.gov/programs/cb/pubs/cm04/cm04.pdf>. More than eighty percent of the children killed were under the age of four. *Id.* Seventy-eight percent of child fatalities due to abuse, neglect, or both were caused by the child's parent. See *id.* at 66.

4. See, e.g., LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS 17 (1996), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvvoatv.pdf> ("[I]n 1994 over 70% of the murders of infants were carried out by a family member."); see also PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 189-214 (1998) (describing America's increased obsession with sexual predators beginning in the 1990s); Leonore Simon, *Sex Offender Legislation and the Antitherapeutic Effects on Victims*, 41 ARIZ. L. REV. 485, 487 (1999) ("The fear of the stranger fuels the majority of criminal legislation, including sex offender laws."). Jenkins states that "although much evidence suggests that abuse is most likely to occur in the domestic or neighborhood setting, with family or neighbors as culprits, concepts of the problem place the blame on outside forces—on fiends and psychopaths, pedophiles and predators." JENKINS, *supra*, at 236.

5. Neely Tucker, *The Avenger*, WASH. POST, Aug. 6, 2006, at D1.

6. See *id.* ("[J]urors just don't want to believe that a parent could beat a child to death, torture him, starve him."); see also Jacy Showers & Julio Apolo, *Criminal Dispositions of Persons Involved in 72 Cases of Fatal Child Abuse*, 26 MED. SCI. & L. 243, 246 (1986) ("[I]t is relatively simple for a parent or caretaker to kill a young child without criminal consequences . . ."). In their study, the authors examined seventy-two child abuse fatalities received at one children's hospital between 1965 and 1984. *Id.* at 243. The authors determined that criminal charges were filed in less than half the cases, and convictions were obtained in only one-third of those cases. *Id.* at 244.

This Article argues that one reason we do not pay sufficient attention to the reality of violence against children in this country, that we struggle with holding some parents accountable for the harm they do to their children, is because of our tendency to romanticize the parent-child relationship. This romanticization phenomenon has several core components. First, we continue to believe that love, not law, is sufficient to protect our children, even in situations where love is clearly not enough. In other words, we engage in denial; we want to believe that parents will do the right thing by their children without the intervention of the criminal justice system. As a result, we tend to focus on therapeutic approaches to address violence committed against children, without grappling sufficiently with difficult questions about whether the criminal justice system can also play an appropriate role. In contrast, reformers working in the spousal-abuse area have been far more willing to consider utilizing a criminal approach. The second component is minimization: when violence does occur, we tend to downplay it. This phenomenon is reflected both in statutes that treat intrafamilial and extrafamilial offenders differently and in the difficulties prosecutors face in securing criminal convictions against parents.

Although in recent years scholars have done important work in thinking about the appropriate contours of the parent-child relationship in the context of family law,⁷ scholars have not engaged in as comprehensive a project in the field of criminal law.⁸ This void is particularly surprising in light of the tremendous power of the criminal law to shape our moral judgments and value systems. This Article is an attempt to begin a conversation about the way children who have been victimized by their parents are treated by the criminal justice system. I suggest that even though we are obsessed with our children, that obsession has not translated into criminal justice policies that adequately protect them. Parental offenders are systematically treated better by the criminal justice system than are extrafamilial offenders, and we need to grapple with whether that preferential treatment is appropriate. I suggest that in many instances it is

7. See, e.g., Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 *passim* (1995) (applying the fiduciary-obligation framework to the parent-child relationship); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1752 (1993) (reviewing how values necessary for children's welfare are undermined by our current conception of parental rights).

8. See Tonya Plank, Note, *How Would the Criminal Law Treat Sethe?: Reflections on Patriarchy, Child Abuse, and the Uses of Narrative to Re-Imagine Motherhood*, 12 WIS. WOMEN'S L.J. 83, 84 (1997) (noting the "dearth of scholarly literature analyzing motherhood and crime"); see also Franklin E. Zimring, *Legal Perspectives on Family Violence*, 75 CAL. L. REV. 521, 539 (1987) ("The significance of relationship in the definition and grading of offenses of violence has long been neglected."). For example, in Martin Guggenheim's recent comprehensive book about children's rights, he barely mentions the role of the criminal justice system in protecting children. See MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS?* 181 (2006) (noting briefly that prior to the 1970s, the criminal justice system was used to protect children from harm more often than the foster care system).

not, and I therefore propose some principles that I hope provide some guidance for the future formulation of criminal justice policy.

The work that has been done in this area has tended to focus on ways in which women's victimization of their children may stem from their own victimization by a patriarchal system that particularly punishes women who fail to conform to the societal conception of the "good mother."⁹ These are important insights to be sure, but I would argue they only begin the inquiry into the contours of the parent-child relationship within the realm of criminal law, rather than definitively answer it. At a minimum, for example, surely the fact that a woman is the victim of domestic violence should be taken into account when deciding what sentencing options are appropriate. But what about the child abuse cases where domestic violence is not involved? One author, for example, has argued that domestic violence and child abuse overlap in forty to sixty percent of cases.¹⁰ While profoundly troubling, that statistic also suggests that domestic violence is *not* present in forty to sixty percent of cases where children are abused. This Article suggests that we need to do some hard thinking about parental rights and responsibilities in those cases as well.

The Article unfolds in five Parts. Part I describes the romanticization phenomenon, drawing on sources both from law and from popular culture to demonstrate how we idealize the parent-child bond. As a result, we have come to believe that we can ordinarily rely upon the strength of that bond, without messy interference from the criminal justice system, to protect our children from harm. In other words, the belief that love, not law, is sufficient to protect our children permeates our approach to family violence.

Part II gives concrete examples of the adverse consequences of this phenomenon and demonstrates how this phenomenon has harmed children. I have chosen in this Part to focus on the most serious crimes that parents can commit against their children: the crimes of murder and rape. These crimes are the focus of the Article because the conduct at issue without question can be characterized as criminal; indeed, these crimes receive our greatest wrath outside the realm of the family. Unfortunately, the romanticization phenomenon affects the criminal justice system's treatment of even these most serious of crimes. This Part also includes a discussion of the parental discipline defense, both because defendants often raise that issue in child homicide cases and because I believe that our continued willingness to endorse the use of corporal punishment against children is contributing to the larger problems discussed in this Article.

9. See Plank, *supra* note 8, at 92-93 (suggesting that "the actions of women who lash out against their children" might be viewed "as a struggle against the violence of patriarchal structures that define their lives").

10. See Bernardine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1, 3-4 (1995) (discussing domestic violence and child abuse as strong predictors of each other).

Part III addresses some of the objections raised to using the criminal justice system more vigorously to protect children from parental violence. For example, perhaps parental offenders simply are less dangerous than stranger offenders. Other objections include the idea that we do not need the incentives of the criminal law to protect children because the fear of losing a child is incentive enough to induce appropriate parental behavior, or that parents who have lost a child are suffering enough and the infliction of additional punishment through the criminal justice system is simply gratuitous and cruel. This Part also grapples with the very real harms that greater use of the criminal justice system could potentially create, such as disruption of families or a disproportionate impact on families of color.

Part IV sets forth some principles that hopefully can better guide policymakers and practitioners in the future as they grapple with how best to protect our children from harm. This Part argues that if we are serious about protecting children as a class from physical injury, we must reorient our thinking about criminal justice policy *toward* the home, rather than away from it. This Part also addresses some of the particular issues related to motherhood and child abuse. Finally, Part V offers some brief concluding thoughts.

I. AMERICA'S ROMANTICIZATION OF THE PARENT-CHILD RELATIONSHIP

In the twenty-first century, our obsession with our children, which rose to a fever pitch in earlier decades,¹¹ has achieved even greater heights.¹² For example, the pop-culture media is replete with references to our current obsession with the well-being of our children. Although these kinds of sources are anecdotal to be sure and certainly not rigorous empirical evidence, they nonetheless paint a striking picture. In the recent book *The Overachievers: The Secret Lives of Driven Kids*, for example, the author discusses the phenomenon of "helicopter parents," a "new breed of parents who hover over their children and swoop in to solve or prevent their problems."¹³

11. See PETER N. STEARNS, ANXIOUS PARENTS: A HISTORY OF MODERN CHILDREARING IN AMERICA 1 (2003) (describing how the twentieth century "became . . . a century of anxiety about the child and about parents' own adequacy"). Stearns adds that "[c]ontemporary children [are] seen as more fragile, readily overburdened, requiring careful handling or even outright favoritism lest their shaky self-esteem be crushed." *Id.* at 3. Clearly, parents view themselves as responsible for providing the necessary careful handling.

12. In a recent interview, Stearns stated that "[p]arental overinvolvement has increased markedly during the past 20 years." Sue Shellenbarger, 'Helicopter Parents' - *The Emotional Toll of Being Too Involved in Your Kid's Life*, WALL ST. J., Apr. 14, 2005, at D1 (describing an interview with Peter Stearns). For some historical perspective on society's changing perspective regarding children, see generally VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 3 (1985), which describes "the profound transformation in the economic and sentimental value of children . . . between the 1870s and the 1930s."

13. ALEXANDRA ROBBINS, *THE OVERACHIEVERS: THE SECRET LIVES OF DRIVEN KIDS* 215-16 (2006).

In *The Price of Privilege*, psychologist Madeline Levine describes the “anxious, overprotective, oversolicitous, intrusive parenting that has become commonplace in affluent communities.”¹⁴ Indeed, today’s “anxious parents are hyperattentive to their kids, reactive to every blip of their child’s day, eager to solve every problem for their child—and believe that’s good parenting.”¹⁵ Further, this obsession is both individualized, in that parents are more invested in their own children than ever before, and generalized, in that as a society, we are increasingly preoccupied with children. One only has to look at the number of magazine covers at a newsstand screaming about the latest celebrity “baby bump,” or the number of books about parenting on the shelf at the local bookstore, to know that children are a hot topic right now.¹⁶

There are doubtless a number of reasons for this obsession with our children. For one thing, families simply are smaller now than in the past, giving parents more time to focus attention on individual children.¹⁷ More fundamentally, in a world of plane hijackings and anthrax attacks, parents perceive the world as a very frightening place, one from which they need to protect children.¹⁸ Further, in a world of high divorce rates in the personal sphere and layoffs, downsizing, and rising bankruptcies in the business sphere, external success in our adult lives seems more elusive than ever before.¹⁹ Thus, our children become one concrete measure of our success;

14. MADELINE LEVINE, *THE PRICE OF PRIVILEGE: HOW PARENTAL PRESSURE AND MATERIAL ADVANTAGE ARE CREATING A GENERATION OF DISCONNECTED AND UNHAPPY KIDS* 74 (2006). Levine adds that “[i]n a maddening paradox, the media, often aided by ‘experts,’ idealizes motherhood while it devalues actual mothers. We are regularly scolded and chastised and warned that our smallest mistakes can have negative lifetime consequences for our children.” *Id.* at 202.

15. Hara Estroff Marano, *A Nation of Wimps*, PSYCHOL. TODAY, Nov.–Dec. 2004, at 64.

16. See, e.g., The Borzoi Reader, Author Q&A: A Conversation with Ann Hulbert, <http://www.randomhouse.com/knopf/catalog/display.pperl?isbn=9780375701221&view=qa> (last visited Sept. 28, 2007) (stating that there “are five times more parenting books published now than in 1970”). Hulbert is the author of *RAISING AMERICA: EXPERTS, PARENTS, AND A CENTURY OF ADVICE ABOUT CHILDREN* (2003).

17. See Sandra G. Boodman, *Sick of Expectations: Pressure to Compete, Not Connect, Leaves Many Affluent Teens Miserable, Says a Psychologist and Author*, WASH. POST, Aug. 1, 2006, at F1 (describing an interview with psychologist Madeline Levine).

18. See generally JOEL BEST, *THREATENED CHILDREN* 87–130 (1990) (describing how the mass media and popular culture can hype up fears about threats to children).

19. See generally Nancy Gibbs et al., *Parents Behaving Badly*, TIME, Feb. 21, 2005. Gibbs describes:

Given these unsettled times, if parents feel less in control of their own lives, they try to control what they can, which means everything from swooping down at the first bad grade to demanding a good 12 inches of squishy rubber under the jungle gym so that anyone who falls will bounce right back.

Id. at 42; see also Boodman, *supra* note 17 (reporting psychologist Madeline Levine’s statements that “a lot of women feel that their best emotional bet is their children” because “[t]he divorce rate is high, friendships are hard to come by, [and] communities are competitive”); Steven

indeed, we perceive our children as reflections of ourselves. As one commentator has suggested, "The process of child 'development' has become more about the parent than the child."²⁰

We are equally obsessed with the notion that parents bear unique responsibility for a child's well-being. "Americans were distinctive, by mid-century, in their willingness to attribute personal problems to parental mishandling."²¹ While parents certainly have significant responsibilities and opportunities in terms of shaping their children's behavior, we find it difficult to accept the notion that there are some aspects of our children's lives that we simply cannot control. We cannot always protect them from life's misfortunes or even ensure that they will grow up to be happy and responsible adults. Therefore, parents become particularly controlling over those aspects of their children's lives that they can in fact influence.

Of course, this idealization of the parent-child relationship, while perhaps now at its greatest intensity, is not just of recent vintage or limited to popular culture.²² It would also be an overstatement to assert that we have always idealized this relationship with equal fervor for all family groupings.²³

Mintz, *How We All Became Jewish Mothers*, NAT'L POST (Toronto), Feb. 17, 2006, at A18 ("As marriage bonds have grown more fragile, parents invest more of their time, emotion, energy and resources into their kids.").

20. ROBBINS, *supra* note 13, at 217. Robbins adds that "several experts have argued that parenting has become this country's most competitive sport." *Id.* at 217-18; *see also* ANN HULBERT, *RAISING AMERICA: EXPERTS, PARENTS, AND A CENTURY OF ADVICE ABOUT CHILDREN* 4 (2003) (discussing Americans' "fixation" with and "cultural anxiety" about the raising of children); Mintz, *supra* note 19 ("Today's society is child-obsessed. But whether contemporary society is child-friendly is another matter.").

21. STEARNS, *supra* note 11, at 54. Stearns cites, as an example, adults who struggle with obesity or anger-management issues. *See id.* If you are too fat, that's because your parents both failed to guide your food choices and left you with insecurities for which you use food to compensate. *Id.* If "you have problems with anger at work," "[s]omehow, your parents did not help you learn to identify and control a dangerous emotion." *Id.*

22. *See* Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 592 (1992) (discussing our "deeply ingrained" "presumption that parents will usually act in the best interests of their children"). McMullen cites all the way back to William Blackstone for this proposition, arguing that "Blackstone noted that Providence had enforced parental duties more effectively than could laws 'by implanting in the breast of every parent that natural . . . or insuperable degree of affection, which not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.'" *Id.* at 593 (alteration in original) (quoting 1 WILLIAM BLACKSTONE, *COMMENTARIES* *435); *see also* Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1323 & n.16 (1994) ("[T]he Framers themselves likely subscribed to the late-eighteenth-century view that family members shared a natural loyalty and affection . . ."). For a description of the history of child protection efforts in America, *see generally* JOHN E.B. MYERS, *CHILD PROTECTION IN AMERICA: PAST, PRESENT AND FUTURE* 11-103 (2006), and Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293 (1972).

23. For example, historically—and deplorably—the legal system has been far more protective of, and more likely to idealize, the parent-child relationship in white families than in families of color. *See discussion infra* Part III.B.2. Society has also been more protective of parent-child relationships in heterosexual families than same-sex families. *See, e.g.*, D. KELLY

But in general, this country has long emphasized the importance of protecting the autonomy and privacy of the family against state interference, in part because of the perception that a family did not need the state's intervention to ensure the protection of its individual members; love would do that instead.²⁴ The Supreme Court's jurisprudence has certainly reflected this tradition, as exemplified by this oft-repeated refrain: "[The law's concept of the family] . . . historically . . . has recognized that natural bonds of affection lead parents to act in the best interests of their children."²⁵ Indeed, it seems the Court relied in part on its belief in the importance and strength of the parent-child bond when concluding that the state has limited constitutional obligations, at best, with regard to protecting its citizens from "private" violence.²⁶

This emphasis on the "natural bonds of affection" to protect our children has had an unfortunate result: we have not grappled sufficiently with the question of whether the criminal justice system can and should play

WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 743-50 (3d ed. 2006) (describing the impact that sexual orientation can have on child-custody decisions).

24. See, e.g., ELIZABETH PLECK, DOMESTIC TYRANNY 8 (1987). Pleck writes:

By the 1830s the private sphere came to acquire a deeply emotional texture; it became a refuge from the hard, calculating dealings of the business world. Relations between family members were seen as qualitatively different—more affectionate, lasting, and binding than those between strangers. Nothing was more sacred and socially useful than mother love—it made children righteous and responsible.

Id. Of course, there are other pernicious facets to this longstanding emphasis on protecting the privacy of the family unit. See, e.g., Elizabeth M. Schneider, *The Violence of Privacy*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 36, 39 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) ("The rhetoric of privacy . . . devalues women and their functions, and says that women are not important enough to merit legal regulation." (citation omitted)); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1118 (1997) ("By the turn of the century, courts seeking to justify wives' continuing legal disabilities described marriage as an emotional relationship subsisting in a private realm 'beyond' the reach of law . . .").

25. Parham v. J.R., 442 U.S. 584, 602 (1979); see also Troxel v. Granville, 530 U.S. 57, 68 (2000) (quoting Parham, 442 U.S. at 602); Lehr v. Robertson, 463 U.S. 248, 256 (1983) ("The intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."); Thomas, *supra* note 22, at 293 ("Our laws and legal systems have developed over hundreds of years around the expectation that parents will love and protect.").

26. See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 197 (1989) (holding that the state has no obligation under the Due Process Clause to protect a child from violence inflicted by his father, even though the state was aware that the child was being abused). Chief Justice Rehnquist felt compelled to point out that if the state functionaries had acted too quickly in taking steps to protect Joshua by removing him from his father's care, "they would likely have been met with charges of improperly intruding into the parent-child relationship." *Id.* at 203.

an important role in protecting children. Consider, for example, the development of one of the most important legal institutions affecting the family this century, the juvenile and family courts.²⁷ Critically, reformers structured these courts around the beliefs that the criminal justice system was ill-equipped to handle the problems of family violence and that a *therapeutic* approach addressed such problems better than a *criminal* one.²⁸ Indeed, the reformers behind the creation of these courts believed that the criminal justice system actually could do affirmative harm because it could lead to the breakup of a family, rather than the strengthening of it.²⁹ As a result, these courts primarily were devoted to preserving the family unit³⁰ and were intended to “offer a curative rather than punitive approach to family problems.”³¹

Even the explosion of interest in child abuse during the early 1960s in some ways reflects the romanticization phenomenon. In 1962, the *Journal of the American Medical Association* published an enormously influential article entitled *The Battered Child Syndrome*, which eventually led members of the

27. See, e.g., ELLEN GRAY, UNEQUAL JUSTICE: THE PROSECUTION OF CHILD SEXUAL ABUSE 10 (2003). Gray describes how child abuse cases, including both physical-abuse and neglect cases, became “decriminalized,” with all “family problems . . . thought amenable to benevolent intervention.” *Id.* Gray suggests that “it is through this less formal judicial system, not the criminal system, that most physical abuse cases [and] virtually all neglect cases . . . that are brought to any kind of justice system are taken, even to this day.” *Id.*

28. As Elizabeth Pleck has written, “The juvenile and family courts founded in the early twentieth century . . . regarded domestic violence as a family problem, not a violation of the criminal law.” PLECK, *supra* note 24, at 11. This same trend is evident in one of the nineteenth-century precursors to family courts, the rapid rise of societies dedicated to the protection of children from cruelty. As Pleck notes, “[T]he law enforcement rhetoric of the [societies] was considerably stronger than their actions. They rarely prosecuted parents for child cruelty . . . [T]heir actual work . . . was primarily threatening and cajoling neglectful, often drunken parents and occasionally removing their children from them.” *Id.* at 70. Pleck adds that “the child cruelty societies operated in a manner similar to the police—they carried a big stick, but rarely used it.” *Id.* at 85.

29. See GRAY, *supra* note 27, at 10 (“[R]esorting to the criminal courts could only stigmatize emotionally ill parents, break up families, and cause economic hardship.”).

30. Elizabeth Bartholet suggests that although family-preservation policies are increasingly the subject of debate, they still remain a vital goal in “the mindset of most of those who make and implement child welfare policy,” including judges, social workers, and lawyers. ELIZABETH BARTHOLET, NOBODY’S CHILDREN 122 (1999); see also *id.* at 113–59 (explaining in detail how traditional family-preservation policies continue to flourish).

31. PLECK, *supra* note 24, at 126. One of Pleck’s more interesting observations is that “judges who favored the establishment of family courts argued that relatives who committed crimes against each other ought not to be punished as common criminals, since they were merely ignorant, mentally deficient, or perhaps lazy and shiftless.” *Id.* To this day, we persist in viewing a parent’s criminal acts committed against a child as an aberration or as a manifestation of some psychological malady, rather than a criminal act. Further, the Progressive reformers who helped found these courts also subscribed to a belief in the power of parental love. As Pleck has written, “Where the previous generations had rebuked depraved parents, the Progressive reformers tried to see behind domestic rage to the ‘natural affection’ between mothers and their children.” *Id.* at 127.

medical and legal communities to devote increasing amounts of time and resources to the problem of child abuse.³² Elizabeth Pleck has made some fascinating observations about the impact of this article and the reform efforts it spurred. She wrote:

The medical definition of child abuse . . . provided more humane treatment for the parent than the view of child abuse as a sin or crime. It implied the assailant was not a criminal, but someone unable to control his or her behavior. . . . Classifying child battery as a syndrome also increased public compassion Most social workers, doctors, and even many lawyers and judges agreed that imprisoning abusive parents—other than those who had murdered their children—was counterproductive. Police and judges were not qualified to handle family problems.³³

Thus, the focus needed to be on “curing” abusive parents, rather than condemning them, and preservation of an intact family unit remained an objective of paramount importance.³⁴

There is a striking contrast in this regard between the development of our approach to crimes committed against women versus crimes committed against children. Efforts to protect children from family violence primarily have emphasized a therapeutic approach, while efforts to curb violence against women have been far more likely in recent years to emphasize a criminal approach.³⁵ Elizabeth Pleck succinctly captured the difference:

32. See generally C. Henry Kempe et al., *The Battered Child Syndrome*, 181 JAMA 19 (1962). Numerous commentators have pointed to the publication of this article as the seminal event that triggered increased interest in the problem of child abuse. See, e.g., Lloyd Ohlin & Michael Tonry, *Family Violence in Perspective*, in *FAMILY VIOLENCE* 1, 1 (Lloyd Ohlin & Michael Tonry eds., 1989).

33. PLECK, *supra* note 24, at 172–73.

34. Numerous academic commentators endorsed this kind of approach to child abuse in the years following the publication of Kempe’s article. See, e.g., Michael Wald, *State Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1027 (1975) (arguing that “criminal penalties for sexual abuse by parents or other family members should be eliminated,” in part because “criminal prosecution will often result in the father’s imprisonment” and “[s]everal recent reports contend that splitting up the family and imprisoning the father may add to the child’s problems”); Lloyd Leva Plaine, Comment, *Evidentiary Problems in Criminal Child Abuse Prosecutions*, 63 GEO. L.J. 257, 259 n.12 (1974) (“Removing the cause of the abuse and strengthening the family rather than punishing the abuser would seem better to serve the end of helping both the child and the perpetrator.”); see also PLECK, *supra* note 24, at 202 (“Programs since the 1960s have been more concerned about ensuring the physical safety of victims than ones earlier in this century, but nonetheless still cling to the belief that the family, after undergoing some sort of treatment, can and should be restored.”). For a more recent example of this viewpoint, see Roger J. R. Levesque, *Prosecuting Sex Crimes Against Children: Time for “Outrageous” Proposals?*, 19 LAW & PSYCHOL. REV. 59, 62 (1995), which suggests that “criminalization efforts are essentially misguided.”

35. Of course, every state has statutes criminalizing some forms of child abuse and neglect, although some of these statutes have problematic features, as Part II discusses. The primary

While reformers against child abuse opposed criminal sanctions against perpetrators, reformers against wife abuse and marital rape favored them and tried to pressure the police and courts to respond adequately to the complaints of women victims. The medical and social work professionals who dominated child abuse reform defined child battering as a psychological illness of the parents requiring social services and psychological treatment. The feminist activists and lawyers who led the campaign against wife beating and marital rape rooted the problem in the inequality of women and the lack of proper law enforcement.³⁶

What can account for this difference in approach?³⁷ First, our belief in parental love is far more unshakeable than our belief in marital love.³⁸ We are used to bitter divorces and the notion that romantic love can end, but we are convinced parental love endures and transcends all other relationships. Second, we persist in viewing our children as our personal property, although we have largely moved beyond that phenomenon when it comes to women.³⁹ We want to be in a world where parents, not the state, have the right to control and direct their children. Third, we view spousal abusers as more dangerous than child abusers. We believe there are no externalities when it comes to child abuse—that an abusive parent poses no danger to anyone outside the home. Abusive partners, on the other hand, easily can move onto other partners and are perceived as more willing to use violence generally.

Feminist scholars previously have offered insights about the way we idealize the institution of motherhood. Jane Murphy, for example, has argued that “[t]he stereotype [family, welfare, and criminal] laws embody is that of a self-sacrificing, nurturing, married, and stay-at-home mother.”⁴⁰

disparities in the way we treat crimes against women versus crimes against children, however, arise in enforcement patterns and priorities.

36. Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640-1980*, in *FAMILY VIOLENCE*, *supra* note 32, at 19, 49–50; see also Douglas J. Besharov, ‘Doing Something’ About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 HARV. J.L. & PUB. POL’Y 540, 553 (1985) (“Most Americans believe that child maltreatment is primarily a social and psychological ill and that treatment and rehabilitation, not punishment and retribution, are the best means of protecting endangered children.”).

37. I am indebted to Mario Barnes for some of the insights in this paragraph.

38. See generally Marsha Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 73 (1998) (“[F]amily relationships are governed by altruism rather than by the constraints of formal justice. Although this tendency has abated in contemporary discussions of marriage, it is still dominant in discussions of the parent-child tie.” (footnotes omitted)).

39. See, e.g., BARTHOLET, *supra* note 30, at 7 (suggesting that most people, across the political spectrum, “share a deep sense that children belong with and to their biological parents” (emphasis added)).

40. Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family, and Criminal Law*, 83 CORNELL L. REV. 688, 690 (1988).

Dorothy Roberts has argued that our legal system not only “reinforces the image of mother as a selfless being,”⁴¹ but it also allows both racial and class stereotypes to influence our definition of the ideal mother.⁴² It is impossible to talk about parenthood and crime without giving special attention to the issue of motherhood, and this Article, therefore, discusses some issues related to mothering in Part IV.

However, this Article suggests that an equally important—and overlooked—point is that we idealize not only the institution of motherhood, but also the parent–child *relationship*, such that we believe we can rely on natural bonds of “loyalty and affection” to protect children without having to resort to the criminal justice system.⁴³ Of course, in many cases, the bonds of love and affection are enough to keep parents from resorting to violence, even when buckling under the enormous stresses and demands that accompany parenthood. But even in cases where a crime has been committed and, thus, those bonds clearly are not enough, this Article suggests that the criminal justice system tends to give preferential treatment to crimes committed by parents as compared to crimes committed by strangers and asks whether that disparity in treatment is justified. The next Part turns to some concrete examples of this phenomenon.

II. EXAMPLES OF THE IMPACT OF THE ROMANTICIZATION PHENOMENON ON THE CRIMINAL JUSTICE SYSTEM

The first Part of this Article described how the romanticization phenomenon influenced the early development of the criminal justice system’s response to violence committed against children by their parents. This Part suggests that the phenomenon remains vital today by describing some of the consequences that the romanticization phenomenon has created within the criminal justice system.⁴⁴ These examples are not

41. Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 103 (1993).

42. See *id.* at 105 (“[S]ocietal concepts of race and class determine the meaning of maternal selflessness.”).

43. Lupu, *supra* note 22, at 1323; see also Garrison, *supra* note 38, at 73 (discussing the “tendency to assume that family relationships are governed by altruism rather than by the constraints of formal justice,” especially in relation to the “parent-child tie”).

44. Another example of how the romanticization phenomenon remains vital today can be found in the Supreme Court’s abortion jurisprudence. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, for example, the Supreme Court struck down a statutory provision requiring women to notify their spouses of their intentions before they could obtain an abortion, in large part because the Court recognized that many marriages involve serious physical and psychological abuse. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 888–98 (1992) (discussing the issue of domestic abuse). In the very same opinion, however, the Court upheld a parental consent requirement without discussing at all the potential for violence in the parent–child relationship. See *id.* at 899. Indeed, the Court’s abortion jurisprudence tends to describe the parent–child relationship in glowing terms. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 649 (1979) (stating that “both the father and mother have an interest—one normally supportive—in helping to determine the course that is in the best interests of a

necessarily exhaustive, but I believe they powerfully demonstrate that we need to think more critically about the way that the criminal justice system addresses parenthood. I have chosen here to focus on conduct that results in the death of a child or involves sexual abuse because we view murder and rape as the most reprehensible crimes that one human being can commit against another. Even in the context of these most serious crimes, the criminal justice system generally treats parents who victimize their own children better than strangers who victimize children. This Part begins with sexual abuse, where the criminal statutes of many states continue to provide the option of giving preferential treatment to parental offenders. It then turns to homicide cases and the related issue of the parental discipline defense.⁴⁵

A. *PREFERENTIAL TREATMENT FOR SEXUAL ABUSERS WHO VICTIMIZE
FAMILY MEMBERS*

One of the most striking ways in which our romanticization of the parent-child relationship victimizes children is the treatment of sexual abuse committed against children by family members. We persist in viewing intrafamilial sexual abuse as less noteworthy and, indeed, as less blameworthy than sexual abuse perpetrated by strangers.⁴⁶ This preferential treatment is evident in two separate ways: first, in the statutory schemes that address child sexual abuse and, second, in the prosecution and conviction rates for intrafamilial sex offenders.

daughter"); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 91 (1976) (Stewart, J., concurring) (stating that abortion is a "grave decision, and a girl of tender years, under emotional stress, may be ill-equipped to make it without mature advice and emotional support" from her parents). In its most recent description of the parent-child bond in an abortion opinion, the Court pronounced that "[r]espect for human life finds an ultimate expression in the bond of love the mother has for her child." See *Gonzales v. Carhart*, 127 S. Ct. 1610, 1634 (2007).

45. For a discussion of how the criminal justice system also privileges family relationships in other contexts, see generally Dan Markel, Jennifer Collins & Ethan Leib, *Criminal Justice and the Challenge of Family Ties*, 2007 ILL. L. REV. 1147.

46. Indeed, we are reluctant to confront the horror of child sexual abuse at all. As Lynne Henderson has written, "Awareness of the existence of sexual abuse of children is too painful and too threatening to encounter unmediated; hence, fully understandable responses include shrinking away from thinking about it, explaining it away, or flatly denying its existence." Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL'Y & L. 479, 481 (1997). Elizabeth Schneider makes a comparable point about the phenomenon of wife battering, arguing that we as a society need "denial." Schneider argues that we "affirm it as a problem that is individual, that only involves a particular male-female relationship, and for which there is no social responsibility to remedy." Elizabeth Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 983 (1991).

1. Statutory Disparities

The statutory schemes employed by various states to address the problem of intrafamilial sex abuse are truly remarkable. Because of legislation like Megan's Law,⁴⁷ we have a perception that state and federal statutes are tough on sex offenders who victimize children, but that statement is far more true for sex offenders who victimize strangers than for sex offenders who select their victims from within the family. This Section focuses on three striking examples of these statutory disparities: the incest loopholes, the sentencing loopholes, and the sex-offender-registration loopholes.⁴⁸

Let us begin with the incest and sentencing loopholes. All states criminalize sexual offenses committed against children. However, if the offender is a family member, many states allow the prosecutor to file charges under an incest statute, rather than under a general rape or sexual abuse statute. As evidenced by the statutory schemes described below, incest convictions typically carry far less significant penalties.⁴⁹ In Alabama, for example, a defendant convicted of rape in the first degree, which includes an adult engaging in sexual intercourse with a child who is under the age of twelve, is guilty of a Class A felony and faces a mandatory sentence of at least ten years and possibly life in prison.⁵⁰ If the offender engages in sexual intercourse with a young family member, on the other hand, the prosecutor can elect to file charges under Alabama's incest statute instead, which is only

47. See *infra* notes 82–84 and accompanying text.

48. At least this issue is beginning to permeate the public consciousness; it was recently the subject of a prominent feature article in *O, The Oprah Magazine's* November 2006 issue. See Jan Goodwin, *Please Daddy, No*, *O OPRAH MAG.*, Nov. 2006, at 320. I am also indebted to PROTECT, an advocacy organization, for some of the information that follows; they have a very useful web site addressing these issues. See Nat'l Ass'n to Protect Children, <http://www.protect.org> (last visited Sept. 29, 2007).

49. One recent and very detailed article used the State of California as an illustration of this problem. See Ruby Andrew, *Child Sexual Abuse and the State: Applying Critical Outsider Methodologies to Legislative Policymaking*, 39 U.C. DAVIS. L. REV. 1851, 1870 (2006). For example, an individual convicted in California of "lewd acts involving children" faced a mandatory jail sentence of at least three years. *Id.* If the victim and defendant were related, however, the prosecutor could elect to file an incest charge instead, which would carry no mandatory sentence of incarceration. *Id.* at 1871. Further, defendants charged with sexual abuse who were not related to their victims were statutorily forbidden from receiving a sentence of probation, but the California legislature specifically exempted offenders who are the victim's "natural parent, adoptive parent, stepparent, relative, or . . . a member of the victim's household" from this prohibition. *Id.* at 172. Although California recently closed these loopholes in response to ferocious lobbying efforts, the article is still a very worthwhile read. For a description of the successful effort to close California's loophole, see the discussion at Nat'l Ass'n to Protect Children, PROTECT California Campaign, <http://protect.org/california/caCOTCampaign.shtml> (last visited Oct. 17, 2007).

50. See ALA. CODE § 13A-6-61 (2005) (defining first-degree rape).

a Class C felony carrying a mandatory sentence of just a year and a day.⁵¹ Similarly, in Delaware, a defendant can be guilty of rape in the first degree, a Class A felony, if he engages in intercourse with a child under the age of twelve.⁵² If the child is a family member, however, the defendant can be charged with incest, which is only a Class A misdemeanor.⁵³ In Delaware, a Class A felony carries a mandatory sentence of at least fifteen years and up to life imprisonment, while a Class A misdemeanor carries no mandatory jail time at all, and the maximum sentence of imprisonment can only be one year.⁵⁴ In all, at least twenty-six states retain some preferential treatment for incest offenders as compared to other sexual offenders: Alabama,⁵⁵ Delaware,⁵⁶ Florida,⁵⁷ Hawaii,⁵⁸ Indiana,⁵⁹ Iowa,⁶⁰ Louisiana,⁶¹ Maine,⁶²

51. See *id.* § 13A-13-3 (defining incest); see also *id.* § 13A-5-6 (providing mandatory sentences). Alabama's incest provision does not include any limitations on the basis of age, so it can apply to sexual contact between a parent and young child or between two consenting adults.

52. See DEL. CODE ANN. tit. 11, § 773 (2005) (defining first-degree rape).

53. See *id.* § 766 (defining incest).

54. Compare *id.* § 4205 (providing sentences for felonies), with *id.* § 4206 (providing sentences for misdemeanors).

55. See *supra* notes 50–51 and accompanying text.

56. See *supra* notes 52–54 and accompanying text.

57. See FLA. STAT. § 800.04(5)(b) (2006) (defining lewd or lascivious molestation against a victim under age twelve by an individual of age eighteen or older as a life felony); *id.* § 826.04 (defining incest as a third-degree felony); see also *id.* § 775.082(3)(a), (d) (providing that life felonies carry a maximum life sentence and that third-degree felonies carry a maximum five-year sentence).

58. See HAW. REV. STAT. § 707-730 (Supp. 2006) (defining sex with a victim under age fourteen, or a victim age fifteen or sixteen if the offender is five years or more older, as a Class A felony); *id.* § 707-741 (1993) (defining incest as a Class C felony); see also *id.* § 706-659 (providing that Class A felonies carry a twenty-year sentence); *id.* § 706-660 (providing that Class C felonies carry a maximum five-year sentence).

59. See IND. CODE § 35-42-4-3(a), (a)(1) (1998) (defining sex with a victim under age fourteen as a Class B felony or, if the offender is age twenty-one or older, a Class A felony); *id.* § 35-46-1-3(a) (defining incest as a Class C felony or, if the other individual is under age sixteen, a Class B felony); *id.* § 35-50-2-4 (providing that Class A felonies carry a minimum twenty-year sentence and a maximum fifty-year sentence); *id.* § 35-50-2-5 (providing that Class B felonies carry a minimum six-year sentence and a maximum twenty-year sentence); *id.* § 35-50-2-6 (providing that Class C felonies carry a minimum two-year sentence and a maximum eight-year sentence).

60. See IOWA CODE § 709.3 (2007) (defining sex with a victim under age twelve as a Class B felony); *id.* § 726.2 (defining incest as a Class D felony); *id.* § 902.9 (providing that Class B felonies carry a maximum twenty-five-year sentence, while Class D felonies carry a maximum five-year sentence).

61. See LA. REV. STAT. ANN. § 14:42D(2) (2007) (providing that sex with a victim under age thirteen carries a sentence of either life imprisonment or death); *id.* § 14:78D(1) (2007) (providing that incest involving a descendant carries a maximum fifteen-year sentence).

62. See ME. REV. STAT. ANN. tit. 17-A, § 253 (2006) (defining sex with a victim under age twelve as a Class A crime); *id.* § 556(1)(A) (defining first offense for incest as a Class D crime); *id.* § 1252 (2)(A), (D) (providing that Class A crimes carry a maximum thirty-year sentence, while Class D crimes carry a maximum one-year sentence).

Maryland,⁶³ Massachusetts,⁶⁴ Minnesota,⁶⁵ Missouri,⁶⁶ Nebraska,⁶⁷ Nevada,⁶⁸ New Mexico,⁶⁹ North Dakota,⁷⁰ Oklahoma,⁷¹ Pennsylvania,⁷² South Carolina,⁷³ Tennessee,⁷⁴ Texas,⁷⁵ Virginia,⁷⁶ Washington,⁷⁷ West Virginia,⁷⁸

63. See MD. CODE ANN., CRIM. LAW § 3-303(c), (d)(4) (West Supp. 2007) (providing that rape of a victim under age thirteen by an individual age eighteen or older carries a minimum twenty-five-year sentence and a maximum life sentence); *id.* § 3-323 (2002) (providing that incest carries a minimum one-year sentence and a maximum ten-year sentence).

64. See MASS. GEN. LAWS ch. 265, § 23 (2006) (providing that unlawful sex with and abuse of a victim under age sixteen carries a maximum life sentence); *id.* at ch. 272, § 17 (providing that incest carries a maximum twenty-year sentence).

65. See MINN. STAT. § 609.342 (Supp. 2006) (providing that sex between a victim under age thirteen and an individual more than the thirty-six months older than the victim carries a maximum thirty-year sentence and a presumptive twelve-year sentence); *id.* § 609.365 (providing that incest carries a maximum ten-year sentence).

66. See MO. REV. STAT. § 566.032 (Supp. 2006) (providing that sex with a victim under age fourteen carries a minimum five-year sentence and a maximum life sentence); *id.* § 568.020 (defining incest is a Class D felony); see also *id.* § 558.011(4) (providing that Class D felonies carry a maximum four-year sentence).

67. See NEB. REV. STAT. § 28-319.01 (Supp. 2006) (providing that sex between a victim under age twelve and an individual age nineteen or older is a Class IB felony with minimum fifteen-year sentence for a first offense); *id.* § 28-703 (1995) (defining incest as a Class III felony); see also *id.* § 28-105 (Supp. 2006) (providing that Class IB felonies carry a maximum life sentence, while Class III felonies carry a minimum one-year sentence and a maximum twenty-year sentence).

68. See NEV. REV. STAT. § 200.366(3)(c) (2006) (providing that sexual assault of a victim under age fourteen carries a life sentence for a first offense); *id.* § 201.180 (providing that incest carries a minimum two-year sentence and a maximum life sentence).

69. See N.M. STAT. § 30-9-11(c)(1) (2004) (defining a sex act with a victim under age thirteen as a first-degree felony); *id.* § 30-10-3 (defining incest as a third-degree felony); *id.* § 31-18-15 (providing that first-degree felonies carry a basic eighteen-year sentence, while third-degree felonies for a sexual offense against a child carry a basic six-year sentence).

70. See N.D. CENT. CODE § 12.1-20-03 (Supp. 2007) (defining a sex act with a victim under age fifteen by an individual more than five years older than the victim as a Class AA felony); *id.* § 12.1-20-11 (defining incest as a Class C felony); *id.* § 12.1-32-01 (providing that Class AA felonies carry a maximum life sentence, while Class C felonies carry a maximum five-year sentence).

71. See OKLA. STAT. tit. 21, § 1114 (2001) (defining rape committed upon a victim under age fourteen by an individual over age eighteen as first-degree rape); *id.* § 1115 (Supp. 2006) (providing that first-degree rape carries a minimum five-year sentence and a maximum sentence of death); *id.* § 885 (2001) (providing that incest carries a maximum ten-year sentence).

72. See 18 PA. CONS. STAT. § 3121(c) (2002) (defining sex with a victim under age thirteen as a first-degree felony); *id.* § 4302 (defining incest as a second-degree felony); see also *id.* § 1103(1)-(2) (providing that first-degree felonies carry a maximum twenty-year sentence; second-degree felonies carry a maximum ten-year sentence).

73. See S.C. CODE ANN. § 16-3-655 (2006) (providing that sexual battery of a victim under age eleven carries a minimum twenty-five-year sentence); *id.* § 16-15-20 (1976) (providing that incest carries minimum one-year sentence).

74. See TENN. CODE ANN. §§ 39-13-522, -531 (2006) (defining sex with a victim under age thirteen as a Class A felony); *id.* § 39-15-302 (defining incest as a Class C felony); *id.* § 40-35-111 (providing that Class A felonies carry a minimum fifteen-year sentence and a maximum sixty-

Wisconsin,⁷⁹ and Wyoming.⁸⁰ A number of other states have eliminated their exemptions only in the past year or so.⁸¹

Prosecutors can, of course, avoid the impact of these statutory disparities if they choose to file charges under a rape statute rather than under an incest statute. However, the discretion typically afforded prosecutors in their charging decisions means that they are not compelled to do so. Moreover, the very existence of these disparate statutory schemes sends a powerful normative message: sexual abuse of a family member is a

year sentence, while Class C felonies carry a minimum three-year sentence and a maximum fifteen-year sentence).

75. See TEX. PENAL CODE ANN. § 21.11 (Vernon 2003) (defining sexual contact with a victim under age seventeen as a second-degree felony); *id.* § 25.02 (Supp. 2006) (defining incest with a descendant as a third-degree felony); *id.* § 12.33 (Vernon 2003) (providing that second-degree felonies carry a minimum two-year sentence and a maximum twenty-year sentence); *id.* § 12.34 (providing that third-degree felonies carry a minimum two-year sentence and a maximum ten-year sentence).

76. See VA. CODE ANN. § 18.2-61 (Supp. 2007) (providing that sex with a victim under age thirteen carries a minimum five-year sentence and a maximum life sentence); *id.* § 18.2-366 (2004) (defining incest with a descendant as a Class 5 felony); see also *id.* § 18.2-10 (Supp. 2007) (providing that Class 5 felonies carry a minimum one-year sentence and a maximum ten-year sentence).

77. See WASH. REV. CODE § 9A.44.073 (2005) (defining sex with a victim under age twelve by an individual at least twenty-four months older than the victim as a Class A felony); *id.* § 9A.64.020 (defining incest with a descendant as a Class B felony); see also *id.* § 9A.20.021 (providing that Class A felonies carry a maximum life sentence, while Class B felonies carry a maximum ten-year sentence).

78. See W. VA. CODE ANN. § 61-8B-7 (LexisNexis Supp. 2007) (providing that sexual contact with a victim under age twelve by an individual age eighteen or older carries a minimum five-year sentence and a maximum twenty-five-year sentence); *id.* § 61-8-12 (2005) (providing that incest carries a minimum five-year sentence and a maximum fifteen-year sentence).

79. See WIS. STAT. § 948.02 (2006) (defining sex with a victim under age twelve as a Class B felony); *id.* § 944.06 (defining incest as a Class F felony); *id.* § 939.50 (providing that Class B felonies carry a maximum sixty-year sentence, while Class F felonies carry a maximum twelve-year-and-six-month sentence); *id.* § 939.616 (providing that sex with a victim under age thirteen carries a minimum twenty-five-year bifurcated sentence).

80. See WYO. STAT. ANN. § 6-2-314 (2007) (providing that sex with a victim under age eighteen by an individual who is the victim's legal guardian, or a victim under age thirteen if the individual is age sixteen or older, carries a maximum fifty-year sentence); *id.* § 6-4-402 (providing that incest carries a maximum fifteen-year sentence).

81. For example, New York's statutory scheme contained the probation and incest loopholes until 2006, thereby allowing prosecutors to charge parental offenders with incest rather than rape and, thus, preserve their eligibility for probation. Compare N.Y. PENAL LAW § 130.35 (Consol. 2000) (defining rape of a child under the age of eleven as a Class B felony), with *id.* § 255.25 (defining incest as a Class E felony); see also *id.* §§ 255.25–27 (Supp. 2007) (containing the amended provisions, which create multiple degrees of incest and define first-degree incest as a Class B felony); Andrew Vachss, Op-Ed., *The Incest Loophole*, N.Y. TIMES, Nov. 25, 2005, available at 2005 WLNR 18733401 (decrying the existence of the incest loophole created by New York's statutory scheme). In large part because of the recent article in *O, The Oprah Magazine*, see generally Goodwin, *supra* note 48, I am hopeful we will soon see more legislative action in this area.

less serious offense than other kinds of sexual assaults and, therefore, warrants a less serious penalty.

Another way in which parents can receive preferential statutory treatment is exemption from sexual-offender-registration requirements.⁸² Following the highly publicized murder of a seven-year-old girl in New Jersey by a convicted sex offender, every state enacted some variant of a law requiring convicted sex offenders to register with the state; many also created various mechanisms to notify citizens if a sex offender was residing in their communities.⁸³ In a recent article, Rose Corrigan focused on the implementation of Megan's Law in New Jersey.⁸⁴ New Jersey uses something called a "Registrant Risk Assessment Scale" to determine an offender's risk of reoffending. Offenders deemed to have higher risk levels are subject to more extensive community-notification requirements.⁸⁵ One of the scale's criteria is "victim selection." Offenders who victimize strangers are given the highest possible score under this criterion, while offenders who victimize "household/family" members, biological children, or stepchildren are given the lowest possible score and deemed to be low-risk offenders.⁸⁶ Corrigan argues that New Jersey's view of "incest as a crime rarely committed and seldom repeated means that in many jurisdictions, acquaintances and intimates are, by definition, incapable of being 'predators' for the purposes of registration and notification."⁸⁷ Further, "individuals convicted of incest are excluded from the state's online sex offender database."⁸⁸

82. California is one example. Parental offenders convicted of certain sexual offenses can apply to be excluded from California's Internet web site identifying sexual offenders, whereas extrafamilial offenders convicted of the same offenses cannot. See California Department of Justice, Sex Offender Registration and Exclusion Information, <http://www.meganslaw.ca.gov/sexreg.aspx> (last visited Sept. 11, 2007) (describing the exclusion program).

83. For a comprehensive listing of the sex-offender-registration laws in all fifty states and the District of Columbia, see Doron Teichman, *Sex, Shame, and the Law: An Economic Perspective on Megan's Laws*, 42 HARV. J. ON LEGIS. 355 app. at 415 (2005), which collects the statutes.

84. Rose Corrigan, *Making Meaning of Megan's Law*, 31 LAW & SOC. INQUIRY 267 (2006).

85. *Id.* at 285.

86. See *id.* at 291; see also OFFICE OF THE N.J. ATTORNEY GEN., ATTORNEY GENERAL GUIDELINES FOR LAW ENFORCEMENT FOR THE IMPLEMENTATION OF SEX OFFENDER REGISTRATION AND COMMUNITY NOTIFICATION LAWS exhibit E at 5 (2005), available at <http://www.state.nj.us/lps/dcj/megan/meganguidelines1-05.pdf> (providing the New Jersey Registrant Risk Assessment Scale Manual). Corrigan reports that the manual accompanying the scale explains this classification as justified because "intrafamilial offenders hav[e] the lowest base rate of reoffense." Corrigan, *supra* note 84, at 291.

87. Corrigan, *supra* note 84, at 299.

88. See *id.* at 301. Corrigan notes that this exclusion was supported by rape-care advocates in order to promote victim confidentiality. Even if the exclusion does protect victims, however, it clearly gives offenders the obvious benefit of avoiding identification as a sex offender to friends, employers, and other members of the community. This is particularly problematic in light of research suggesting that many incest offenders crossoffend, in that they also abuse

2. Disparities in Prosecution and Conviction Rates for Child Sexual-Assault Cases

The previous Section demonstrated how the romanticization phenomenon is reflected in various state statutory schemes, but the phenomenon's impact extends beyond the statute books. Although there has been little empirical work about prosecution and conviction rates in the context of sexual abuse crimes committed against children by family members,⁸⁹ the available evidence suggests that parents who abuse their own children, rather than strangers, are charged less often and sentenced less severely than adults who abuse nonrelatives. In terms of charging, for example, one study of sexual assaults that took place between 1991 and 1996 concluded that "[a]n offender was arrested in just 19% of the sexual assaults of children under age 6."⁹⁰ This low arrest rate is particularly striking in light of the fact that forty-nine percent of the defendants who assaulted children under the age of six were family members of their victims, while only three percent were strangers—a statistic that would presumably reduce the difficulties for police and prosecutors associated with identifying and locating an offender.⁹¹

One study conducted in the early 1990s by a social worker concluded that "[c]learly, where the abuser is outside the family, cases are handled more aggressively by the legal system."⁹² For example, "only half as many extra-family cases were diverted to treatment," rather than remaining in the criminal justice system.⁹³ A slightly more recent study concluded that "[t]here was a trend toward non-referral for prosecution when the accused

victims outside their immediate families. See *infra* notes 161–66 and accompanying text (discussing this research).

89. See HOWARD SNYDER, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 1 (2000) (stating that "while a few highly publicized incidents are engraved in the public's consciousness, there is little empirically-based information" about "sexual assaults of young children"); see also Charles Phipps, *Children, Adults, Sex and the Law*, 22 SETON HALL LEGIS. J. 1, 104 (1997) ("[V]irtually no information is available on how often sexual crimes against children are prosecuted in the United States."). Indeed, it is important to note a key limitation of many of the studies discussed in this Section and in Part B—they are now several years old. It is, of course, possible that prosecution rates might have changed in recent years, and this area is ripe for future research.

90. SNYDER, *supra* note 89, at 11. Moreover, "even when considering all means of clearances [such as closing a case due to the death of the suspect], the youngest victims (under age 6) still had the smallest proportion of their victimizations cleared by law enforcement." *Id.* at 12.

91. *Id.* at 10. In contrast, "just 12% of the offenders who sexually assaulted adults were family members of the victims." *Id.*

92. GRAY, *supra* note 27, at 114. Gray studied the handling of child sexual abuse cases in eight different jurisdictions across the country: Baltimore County, Maryland; Clay, Duval, and Nassau Counties, Florida; Dallas County, Texas; Jefferson County, Kentucky; Johnson County, Kansas; Orleans Parrish, Louisiana; St. Louis, Missouri; and San Francisco, California. *Id.* at 26.

93. *Id.*

was more closely related to the child victim . . . Police referred 79% of the cases involving stranger perpetrators to the [district attorney]'s office compared to only 52% of the cases involving parent/stepparent alleged offenders."⁹⁴ Indeed, this study concluded that the "lowest percentage of criminal-action cases observed was when the perpetrator was thought to be a parent/stepparent."⁹⁵

In terms of sentencing, another 1990s-era study surveyed 600 prosecutors who handled child sexual abuse cases. Seventy-two percent of the respondents "agreed with the statement that 'intrafamilial cases result in more lenient sentences.'"⁹⁶ A study from the mid-1980s of 388 "founded" cases, or cases where social workers believed the underlying allegations, determined that "[p]arents were less likely to be prosecuted, and, if prosecuted, they often received little or no incarceration and surprisingly short periods of probation."⁹⁷

Of course, child sexual abuse can be very difficult to prove. There are typically no witnesses to the abuse other than the child victim, and children may have a difficult time testifying convincingly due to youth or trauma.⁹⁸

94. Delores D. Stroud, Sonja L. Martens & Julia Barker, *Criminal Investigation of Child Sexual Abuse: A Comparison of Cases Referred to the Prosecutor to Those Not Referred*, 24 CHILD ABUSE & NEGLECT 689, 694 (2000). This study looked at cases involving 1,043 children who were allegedly the victims of sexual abuse by adults between January 1, 1993, and December 31, 1996, in one county in New Mexico. *Id.*

95. *Id.* at 697. *But see* Tausha L. Bradshaw & Alan E. Marks, *Beyond A Reasonable Doubt: Factors that Influence the Legal Disposition of Child Sexual Abuse Cases*, 36 CRIME & DELINQ. 276, 284 (1990) (reviewing 350 cases of child sexual abuse in a Texas county and concluding, without providing any statistics, that "the child's relationship to the offender had [no] impact on the decision to prosecute"). Even in this study, only 34.6% of the cases resulted in a conviction or plea before trial. *Id.* at 281 tbl.1.

96. BARBARA E. SMITH & SHARON GORETSKY ELSTEIN, AM. BAR ASS'N, THE PROSECUTION OF CHILD SEXUAL AND PHYSICAL ABUSE CASES: FINAL REPORT 45, 143 (1993). An earlier American Bar Association report of 159 prosecuted cases reached several interesting conclusions, though it is important to note this study is now twenty years old. *See generally* JANE ROBERTS CHAPMAN & BARBARA E. SMITH, AM. BAR ASS'N CRIMINAL JUSTICE SECTION, CHILD SEXUAL ABUSE: AN ANALYSIS OF CASE PROCESSING (1987). First, "strangers who molested children were incarcerated in 86 percent of cases, while parents molesting their children were incarcerated less frequently—in about 65 percent of cases." *Id.* at 27. Moreover, "[i]t is in length of sentence that the greatest differences are apparent"—58% of strangers who molested children received a sentence of ten years or more; 68% of parents who molested their children received a sentence of twelve months or less. *Id.* at 27–28. A second phase of this study that looked at police and social-services case files in two different counties concluded that "[p]arents who sexually abused their children were less often arrested and prosecuted and received shorter sentences than abusers with other relationships to their victims." *Id.* at 82.

97. Jane Roberts Chapman & Barbara Smith, *Response of Social Service and Criminal Justice Agencies to Child Sexual Abuse Complaints*, 10 RESPONSE TO VICTIMIZATION WOMEN & CHILDREN 7, 13 (1987). Unfortunately, Smith and Chapman do not provide the precise statistics behind this conclusion; they do note, however, that only "40 percent of the cases in the sample were eventually prosecuted." *Id.*

98. *See* 1 JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 5.1 (3d ed. 1997); *see also* 2 *id.* § 6.45, at 121 ("Psychological research indicates that many jurors 'enter the

But these problems should not explain the prosecution disparity; they would seem to apply equally whether the offender is a parent or an acquaintance.⁹⁹ Perhaps one possible reason for the disparity is the fear of fabrication when a charge is leveled against one parent in the context of a divorce or custody proceeding. Estimates as to the percentage of allegations that are in fact fabrications vary, but the popular perception of spurned and fabricating mothers seems clearly incorrect.¹⁰⁰ Two relatively recent studies concluded that “the rate of reports of abuse during custody and parental access disputes [is] only two to five percent, and the rate of substantiation of these reports is the same as for reports that do not occur during custody disputes.”¹⁰¹

There are certainly other factors that potentially could affect prosecutorial and jury decision making. Maybe parents are less likely to have a prior criminal history, for example.¹⁰² Maybe prosecutors’ primary concern is avoiding the breakup of a family. The romanticization phenomenon may not be the only reason behind the disparity of treatment, but it is an important one: we do not want to believe that a parent could sexually abuse a child. “It is much easier for community members to believe that the child is confused and misinterpreted an innocent touch or an act, or that the child is lying out of vindictiveness toward the suspect.”¹⁰³ We also persist in

courtroom with doubts about the credibility of child witnesses.” (quoting Gail S. Goodman et al., *Jurors’ Reactions to Child Witnesses*, J. SOC. ISSUES, Summer 1984, at 139, 139)); Theodore P. Cross, Debra Whitcomb & Edward De Vos, *Criminal Justice Outcomes of Child Sexual Abuse: A Case Flow Analysis*, 19 CHILD ABUSE & NEGLECT 1431, 1432 (1995) (“[P]rosecution can be difficult because of public skepticism about allegations, the challenges of obtaining evidence, and the frequent necessity of relying on child victims’ testimony.”). For a discussion of why testifying can be so difficult for children, see Debra Whitcomb, *Prosecuting Child Sexual Abuse—New Approaches*, N.J. REP., May 1986, at 2, 2–5.

99. Children may, of course, *report* the abuse less frequently when the offender is a parent. See, e.g., Stroud, Martens & Barker, *supra* note 94, at 697 (concluding that children were significantly less likely to disclose sexual abuse when the offender was a parent). The studies discussed above, however, involved cases where law enforcement was aware of the allegations.

100. See, e.g., 1 MYERS, *supra* note 98, § 5.5, at 437–41 (collecting some older studies). The various studies Myers cited estimated fabrication rates in custody cases as between twenty and fifty-five percent. See *id.* at 438–39. These studies all involved very small sample sizes, however. See *id.* Interestingly, another study estimated the fabrication rate for *all* cases of child sexual abuse at approximately eight percent. See *id.* at 437 (citing David P.H. Jones et al., *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. INTERPERSONAL VIOLENCE 27, 28 (1986)).

101. NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, INVESTIGATION AND PROSECUTION OF CHILD ABUSE 29 (3d ed. 2004) (describing the studies).

102. I was unable to find any studies that used a multiple-regression analysis to try to break out the statistical significance of these different factors; this area is ripe for future research.

103. NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, *supra* note 101, at 73; see also *id.* at 178 (discussing the phenomenon of “juries who would rather believe anything other than a seemingly normal person gratifying his sexual desires at the expense of a helpless child victim”); SMITH & ELSTEIN, *supra* note 96, at 71 (describing prosecutors’ complaints about “public disbelief that child sexual abuse occurs, particularly within the family (society wants to believe

our belief that parents who would molest a child must be mentally ill and, thus, that families would be better served by mental health treatment rather than intervention from the criminal justice system.¹⁰⁴ We also see the same phenomenon here that exists in physical abuse cases: families often are more supportive of the suspect than the child. For example, in summarizing the findings of a survey of 600 prosecutors, the American Bar Association reported that “[w]e were told time and time again that nonoffending parents (most often mothers) are likely to pressure children to recant, citing economic hardships once the family bread-winner is removed from the home or jailed.”¹⁰⁵

B. THE DIFFICULTY OF SECURING CONVICTIONS IN CHILD HOMICIDE CASES

One of the most striking examples of the romanticization phenomenon is the difficulty prosecutors face in charging and convicting parents when a child dies due to parental abuse or neglect. As one prosecutor has said, “Juries don’t want to believe parents could kill a child. They want to believe it was an accident and will look for every possible explanation but murder.”¹⁰⁶

Of course, just like child sexual abuse cases, child homicide cases present unique evidentiary problems. The fatal abuse is typically inflicted within the confines of a home, virtually eliminating the possibility of outsider eyewitness testimony. Additionally, multiple adults may be present in the home at the time of the abuse, making it difficult to determine which adult was the culprit.¹⁰⁷ Fatal abuse often is inflicted with the hands,

that the offender looks different from everyone else and is a perverted stranger, rather than a trusted family member”).

104. See NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, *supra* note 101, at 170 (noting public opinion that anyone who would sexually abuse a child must be “sick”).

105. SMITH & ELSTEIN, *supra* note 96, at 48; see also NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, *supra* note 101, at 76 (“[I]n a large percentage of [sexual abuse] cases, the victim’s family is supportive of the offender by the time the case comes to trial.”). It is important to note that these two sources are addressing issues from a prosecutorial perspective, but they are nonetheless indicative of the problems prosecutors believe they face.

106. Ruth Teichroeb, *Cases Among Toughest to Prosecute; Juries Don’t Want to Believe Parents Could Kill a Child*, SEATTLE POST-INTELLIGENCER, Nov. 1, 2002, at A1 (quoting King County Deputy Prosecutor Lisa Johnson); see also Tucker, *supra* note 5 (“[A lack of witnesses] make[s] child homicides among the toughest prosecutions in the trade; jurors just don’t want to believe that a parent could beat a child to death, torture him, starve him.”). There are interesting parallels here to wife-battering. Elizabeth Schneider has argued, for example, that women in particular need to “deny the pervasiveness of the problem so as not to link it to their own life situations” and that “jurors . . . try to remove themselves and say that it could never happen to me.” Schneider, *supra* note 46, at 984.

107. See Lissa Griffin, “Which One of You Did It?” *Criminal Liability for “Causing or Allowing” the Death of a Child*, 15 IND. INT’L & COMP. L. REV. 89, 89 (2004) (identifying the special problems involved in prosecuting child homicide cases); cf. John E.B. Myers, *Adjudication of Child Sexual Abuse Cases*, FUTURE CHILDREN, Summer–Fall 1994, at 84, 84–85 (noting that child sexual abuse is also very difficult to prove because there may be no eyewitnesses other than the victim).

eliminating the possibility of locating a murder weapon that might help establish the identity of the defendant through fingerprints or purchase records.¹⁰⁸

But I believe something more than evidentiary problems is at work here. Because we romanticize the parent-child relationship, we need denial and, thus, are unwilling to grapple with the possibility that a parent could intentionally and malevolently choose to inflict harm upon a child.¹⁰⁹ This unwillingness to believe accusations of abuse is found both in family members of the suspect, who often continue to support the accused,¹¹⁰ and in the general public. For example, in fatal neglect cases, "juries identify with the accused, believing any parent can make a mistake."¹¹¹ This identification phenomenon extends to cases of physical abuse: "Most members of the general public have been stressed themselves by child care responsibilities and feel some sense of sympathy for the abuser, who is seen as having lost control."¹¹² In cases of nonfatal abuse, the romanticization of the family relationship and parent-child bond is particularly invidious: "Unlike victims of most other crimes, child victims of abuse are sometimes castigated as villains by family members and friends who hold them responsible for the break-up of the family."¹¹³

108. See Tucker, *supra* note 5 ("[K]ids . . . are primarily dispatched with some blunt object that's never found. No fingerprints. No murder weapon.").

109. See NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, *supra* note 101, at 169 ("Underlying all child abuse prosecutions is a public desire to disbelieve what studies show to be a high prevalence of sexual and physical abuse of children."); 1 AM. BAR ASS'N CTR. ON CHILDREN & THE LAW ET AL., JUSTICE SYSTEM PROCESSING OF CHILD ABUSE AND NEGLECT CASES: FINAL REPORT 15 (1996) ("Every professional interviewed stressed the difficulty in prosecuting cases because the general public, and thus jurors, are extremely reluctant to believe physical child abuse allegations.").

110. See Teichroeb, *supra* note 106 ("Families side with the suspect, unwilling to face the truth."). Another prosecutor in Washington stated that "often the parent who is not responsible will cover up for the other one. They seem to think 'well, the child is gone, so I might as well keep the relationship.'" *Id.* (quoting Pierce County prosecutor Sunni Ko). A prosecutor in the District of Columbia who specializes in child homicides noted that "[t]he people who come to the hearings are either there for the mother or the father. None of them talks about the dead kid." Tucker, *supra* note 5 (quoting prosecutor June Jeffries).

111. Teichroeb, *supra* note 106. As one attorney in Washington said, "A lot of our biases as a society are toward protecting the parents, not the kids." *Id.* (quoting former King County special assault unit prosecutor Kathy Goatering).

112. NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, *supra* note 101, at 170; see also AM. BAR ASS'N CTR. ON CHILDREN & THE LAW ET AL., *supra* note 109, at 4-25 (describing an interview with the head of child abuse prosecution unit in San Diego who "expressed the opinion" that "[j]urors simply do not believe that parents, or caretakers, intentionally harm their children, but instead see the injuries as the accidental result of discipline and corporal discipline that parents can, and often should, impose").

113. NAT'L CTR. FOR PROSECUTION OF CHILD ABUSE, *supra* note 101, at 1.

Scholars have done little empirical work on this issue, and the area is ripe for future research.¹¹⁴ One twenty-year-old study looked at the “criminal disposition of persons involved in 72 cases of fatal child abuse” at a Columbus, Ohio, pediatric hospital between 1965 and 1984.¹¹⁵ The findings led the authors to conclude that “it is relatively simple for a parent or caretaker to kill a young child without criminal consequences since the crime can be committed in virtual secrecy or isolation.”¹¹⁶ No charges were filed against more than half of the sixty-three perpetrators identified as being involved in fifty-seven total incidents.¹¹⁷ For fifty-seven out of the seventy-two child deaths studied, or seventy-eight percent, no one served any jail time.¹¹⁸

114. See ANIA WILCZYNSKI, CHILD HOMICIDE 12 (1997) (“[W]e know very little at all about how child-killers are dealt with by the criminal justice system.”). One fascinating recent study, for example, attempted to determine how the nature of the relationship between an offender and a victim affected criminal justice decision making but unfortunately lumped cases of parents who killed their children together with all other family-member killings (except for those killings involving intimate or romantic partners). See Myrna Dawson, *Rethinking the Boundaries of Intimacy at the End of the Century: The Role of Victim-Defendant Relationship in Criminal Justice Decision-Making over Time*, 38 LAW & SOC’Y REV. 105, 105 (2004) (investigating whether the degree of intimacy between victims and defendants affects legal responses to violence). Although I believe this category is overbroad, Dawson nonetheless reached the interesting conclusion that defendants who killed family members on average “received sentences close to two and a half years shorter than for those who killed strangers.” *Id.* at 125.

115. Showers & Apolo, *supra* note 6, at 243. There is also relatively little research on prosecution rates in cases involving nonfatal abuse. See AM. BAR ASS’N CTR. ON CHILDREN & THE LAW ET AL., *supra* note 109, at 2-2 (“[T]here is virtually no empirical literature addressing the contemporary judicial processing of child abuse and neglect cases.”); Myers, *supra* note 107, at 92 (“Few national data are collected, however, about the percentage of investigated child abuse cases that are prosecuted.”). One study, which looked at 833 substantiated cases of child abuse in Los Angeles, Denver, and Newcastle County, Delaware, from 1985 to 1986, concluded that “nonparent adult perpetrators and juvenile perpetrators were significantly more likely to be prosecuted than the biological parents of the victim.” Patricia Tjaden & Nancy Thoennes, *Predictors of Legal Intervention in Child Maltreatment Cases*, 16 CHILD ABUSE & NEGLECT 807, 816 (1992). One more recent study involved a meta-analysis of other studies about child abuse prosecutions. See Theodore Cross et al., *Prosecution of Child Abuse: A Meta-Analysis of Criminal Justice Decisions*, 4 TRAUMA VIOLENCE & ABUSE 323, 323-25 (2003). Although this study did not investigate the treatment of parental offenders as compared to non-parental offenders, *see id.*, it reached a number of interesting conclusions. For example, the authors concluded that “child abuse was less likely to lead to filing charges and incarceration than most other felonies but more likely to be carried forward without dismissal” if charges were filed. *Id.* at 323. The authors hypothesized that “the lower incarceration rate may be a function of child abuse perpetrators’ frequent close relationship to victims, which may lead judges to perceive child abuse as less serious or to avoid incarceration because of the impact they believe it will have on the family.” *Id.* at 336.

116. Showers & Apolo, *supra* note 6, at 246.

117. Some of the incidents involved more than one perpetrator, and in some cases, a perpetrator could not be identified. *Id.* at 244.

118. *Id.* at 246. One other very interesting finding from the study was that “female caretakers are less likely than males to be charged, convicted, and imprisoned.” *Id.* Only two women served any jail time in the cases studied. *Id.*

A study conducted of child killings in Australia, although using a relatively small sample size, found that cases where parents killed children received preferential treatment as compared to cases where strangers killed children.¹¹⁹ For example, parental killers were much less likely to be convicted of murder than non-familial killers; parental killers typically received manslaughter convictions instead.¹²⁰

I recently conducted a study examining disparities in the prosecution of fatal neglect cases. That research showed parents clearly receive preferential treatment by the criminal justice system vis-à-vis other caregivers when a child dies because of adult negligence.¹²¹ The empirical study examined cases over a six-year period where children died of hyperthermia after being left unattended in motor vehicles on hot days.¹²² Parents were prosecuted in 53.75% of such incidents, a surprisingly high percentage in light of the common perception that parents are rarely prosecuted in cases involving deaths due to parental negligence.¹²³ However, individuals not related to the victim were prosecuted at strikingly higher rates, in 88.8% of cases where I was able to trace the prosecution history.¹²⁴

There also appear to be disparities in sentencing, an additional area for future research. A senior attorney with the National Center for Prosecution of Child Abuse reports that offenders often receive shorter sentences for killing a child than for killing an adult, in part because parents are often charged with less serious offenses in the context of child deaths.¹²⁵ The

119. See WILCZYNSKI, *supra* note 114, at 171–79. Wilczynski examined the cases of twenty-five victims. *Id.*

120. See *id.* at 174. Only one of the filicide offenders was convicted of murder, as compared to thirteen of the fifteen nonfamilial offenders.

121. See Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. 807, 828 (2006).

122. *Id.* at 820–24.

123. *Id.* at 828; see, e.g., CHRISTINE ALDER & KEN POLK, CHILD VICTIMS OF HOMICIDE 20 (2001) (stating, without citation, that prosecutions are “uncommon” when a child dies as the result of parental negligence, such as being left unattended in a bathtub or in a house where a fire later broke out); Zimring, *supra* note 8, at 532 (asserting, without citation, that “[t]housands of children die accidentally each year because negligently supervised by parents, but only a trickle of cases are prosecuted in the United States”).

124. Collins, *supra* note 121, at 828. A chi-square analysis confirmed that the difference in prosecution rates is statistically significant at a ninety-nine percent confidence level; the p-value was 0.0011. *Id.*

125. See Teichroeb, *supra* note 106 (citing an interview with Dawn Wilsey). Wilsey noted that the difficulty involved with proving premeditation often accounts for the charging decisions. *Id.* Indeed, in many other countries there are often statutes in place that guarantee less severe sentences. Michelle Oberman reports that “[m]any nations around the world have statutes specific to infanticide; all but one of these makes infanticide a less severe crime than ordinary homicide.” Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 8 DEPAUL J. HEALTH CARE L. 3, 22 (2004).

Australian study referenced above concluded that parental killers received much lighter sentences than non-familial killers.¹²⁶

At this point, a reader might be thinking, “Wait a minute; we *are* tough on parents who kill their children. What about Susan Smith and Andrea Yates?” I agree that there are some cases where the criminal justice system treats parents very harshly, but these cases typically have some “aggravating” factors like multiple victims or a sensational back story.¹²⁷ Engage in a thought experiment for a minute. Can you think of the names of any other mothers, or fathers for that matter, who have killed their children? The outcome of two highly publicized cases does not mean that we are tough on parents who commit crimes against their children.

C. THE PARENTAL DISCIPLINE DEFENSE

At this point, I want to turn away from the crimes of homicide and rape to a more common form of violence committed against children—corporal punishment. This issue is important within the larger context of this Article not only because some child homicide cases involve the appropriateness of corporal punishment, but also because our continuing acceptance of this practice reflects the romanticization phenomenon. We trust that parents will use physical force against their children in an appropriate way, whereas we are far less willing to endorse the practice of unrelated adults hitting children. More fundamentally, I believe the continued prevalence of corporal punishment contributes to our current cultural mindset of minimization and denial in relation to parental violence, an issue that Part IV of this Article develops more fully.

Spanking continues to be an incredibly common practice in America. Approximately ninety percent of Americans hit or spank their children, and every state currently gives parents “some form of a privilege” to do so.¹²⁸

126. WILCZYNSKI, *supra* note 114, at 174; *see also* Oberman, *supra* note 125, at 50 (stating that the criminal justice outcomes in the infanticide cases she studied “tend to reflect a pattern of lenience”).

127. Andrea Yates, for example, killed five children and had a documented history of mental illness coupled with a demanding spouse whose unsupportive conduct was perceived as contributing to the horrific outcome in that case. Susan Smith also killed multiple victims and attempted to pin her sons’ disappearance on an African-American man, thereby whipping up a media frenzy. Michelle Oberman makes some interesting points in this regard. She writes that “[t]he rhetoric of moral outrage expressed by society at large and by judges and juries in *individual* cases is accompanied by an equally strong tendency to view these crimes as arising out of external circumstances, and therefore to resist equating [infanticides] with murder.” Oberman, *supra* note 125, at 6 (emphasis added); *see also id.* at 82 (referring to the “dialectic of moral outrage and legal mercy”). Oberman adds that “[i]ronically, in both historical and contemporary societies, the tendency to treat infanticide as less heinous than other forms of murder is seldom acknowledged.” *Id.* at 6.

128. Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 577 (2003). Pollard explains that some states maintain the defense through “common law applications of the defense of justification,” while other states have formally codified the defense. *Id.* at 635.

States provide this opening through the mechanism of the parental discipline defense.

The parental discipline defense operates in different ways in different states, but in general terms, it provides a parent or guardian with a defense to a criminal charge involving the use of force against a child as long as the parent was intending to discipline the child through the use of force and did not use unduly dangerous force. Several states base their laws on the Model Penal Code, which states:

The use of force upon or toward the person of another is justifiable if: (1) the actor is the parent or guardian . . . and: (a) the force is used for the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of his misconduct; and (b) the force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation¹²⁹

This defense can be raised in both fatal and non-fatal cases of abuse.¹³⁰

There is a contrast here with our attitudes toward the use of corporal punishment by someone other than the child's parent. Although every state retains a variant of the parental discipline defense,¹³¹ twenty-seven states and the District of Columbia have outlawed the use of corporal punishment in public schools.¹³² Moreover, "thirty-seven states prohibit foster parents from spanking; forty-two states do not allow corporal punishment in residential institutions and agency group homes; thirty-nine states prohibit it in day-care centers; and thirty-two prohibit such punishment in family-care centers."¹³³ Franklin Zimring cites an intriguing hypothetical posed by Roger McIntire involving a careless child in a supermarket who accidentally knocks a group of oranges to the floor.¹³⁴ Imagine that the child's mother then "grabs the daughter, shakes her vigorously, and slaps her."¹³⁵ McIntire asks us if we

For another discussion of the history and scope of the parental discipline defense, see generally Kandice Johnson, *Crime or Punishment: The Parental Corporal Punishment Defense—Reasonable and Necessary, or Excused Abuse?*, 1998 U. ILL. L. REV. 413.

129. MODEL PENAL CODE § 3.08 (1985); see also Pollard, *supra* note 128, at 637–38 (discussing the Model Penal Code provision and the fact that its language is relied upon by a number of states).

130. See Pollard, *supra* note 128, at 621 ("[T]he defense of 'discipline' is raised in forty-one percent of homicide prosecutions against parents who 'accidentally' killed their child through discipline.").

131. *Id.* at 577.

132. *Id.* at 593. Pollard also notes that "an additional eleven states had banned it against most public school children by local rules." *Id.* at 593.

133. *Id.* at 586.

134. See Zimring, *supra* note 8, at 523 (quoting Roger W. McIntire, *Parenthood Training or Mandatory Birth Control: Take Your Choice*, PSYCHOL. TODAY, Oct. 1973, at 34, 36).

135. *Id.*

would intervene or, instead, consider it a private matter for the family to resolve.¹³⁶ He then asks us to imagine that the child in question is not related to the mother and consider whether our responses change.¹³⁷ Is there any doubt that we would be more outraged if the irate mother slapped someone else's child and not her own daughter?¹³⁸

Why this disparity in both public attitudes and legal standards? Do we believe parental motives to be more benign than those of the unrelated caregiver? In either the daycare or the home, it seems clear that the caregiver could decide to spank a child solely because the child disobeyed the caregiver—a classic context in which the parental discipline defense would be recognized. So even when the motives underlying the use of force are the same, we give more latitude to the parent. Thus, ascribing the differential treatment to a difference in motive is plainly unsatisfactory.

Can we explain the disparity by the notion that we trust parents to be more benevolent in the use of physical force? This answer hardly seems satisfactory either. As any parent of a young child can attest, the monotony and relentlessness of child care demands can lead to a feeling of blind rage about your own child's misbehavior that far exceeds any rage that someone else's child could incite. The answer must be, in part, that we feel more uncomfortable about intervening in the realm of the family than in the realm of the daycare or the schoolhouse because of our concerns about intruding too far into a zone of family privacy. But we need to recognize that children often need more protection at home than in school—in school there will often be other adults or children present who could intervene if the punishment becomes excessive. In the home, children are more likely to be utterly alone.

III. OBJECTIONS TO USING THE CRIMINAL JUSTICE SYSTEM IN CASES INVOLVING FAMILY VIOLENCE

What are some of the objections raised to the more aggressive use of criminal prosecution to confront the problem of violence committed against children? I believe we can usefully group the objections into two categories. The first set of objections is normative and revolves around the notion that parental offenders are simply different than other perpetrators and, thus, warrant differential treatment. The second set of objections is instrumental and revolves around the idea that the criminal justice system is, in fact, not the most effective approach that we could use to protect our children.

136. *Id.*

137. *Id.*

138. See PLECK, *supra* note 24, at 9 (“[I]n many areas of law a stranger is entitled to more legal protection than a family member.”).

A. PARENTAL OFFENDERS ARE DIFFERENT

1. Deterrence Through the Criminal Justice System Is Unnecessary

One common objection to bringing parental offenders into the criminal justice system is that prosecution is unnecessary because parents already have sufficient incentives to avoid causing harm to their children. The primary source of these incentives is, of course, the "natural bonds of affection" that we persist in believing all parents feel for their children.¹³⁹

In this regard, the criminal justice system has displayed a stubborn unwillingness to recognize that social-science research should undermine, at least with some parents, our unwavering belief in "parental concern for the nurture and upbringing of their children."¹⁴⁰ Multiple researchers have concluded that one feature of abusive or neglectful parents is that they have "unrealistic expectations of the child" and, therefore, are quick to condemn developmentally appropriate behavior as a justification for discipline.¹⁴¹ Indeed, an uncomfortable truth is that some parents simply have negative attitudes toward children.¹⁴² "Abusive parents, when compared to nonabusers . . . often perceive their own children as more aggressive, disobedient, stupid, and annoying than other children."¹⁴³

139. See, e.g., Scott & Scott, *supra* note 7, at 2436 ("The utility of parents' affective bonds and informal social norms in promoting desirable behavior reduces substantially the role for formal legal incentives in mitigating conflicts of interest.").

140. *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); see also MYERS, *supra* note 22, at 153 (stating that "in [his] experience, some professionals balk at coming to terms with deliberate, intentional abuse"). Myers adds that "the medical model of maltreatment, with its emphasis on illness, diagnosis, and treatment . . . so dominates writing and thinking about child maltreatment that it squeezes out unvarnished analysis of deliberate abuse." *Id.* He further argues that "[c]hild welfare professionals who resist seeing intentional abuse for what it is, and who insist on viewing abuse and neglect exclusively through psychological lenses, dilute the moral authority of society to condemn evil." *Id.* at 154; see also McMullen, *supra* note 22, at 592-96 (explaining why we should question the law's general presumption that parents will automatically and naturally act in the best interests of their children).

141. Renitta L. Goldman, *An Educational Perspective on Abuse*, in CHILDREN AT RISK: AN INTERDISCIPLINARY APPROACH TO CHILD ABUSE AND NEGLECT 37, 42 (Renitta L. Goldman & Richard M. Gargiulo eds., 1990) (collecting studies).

142. See MARY ANN JONES, PARENTAL LACK OF SUPERVISION: NATURE AND CONSEQUENCE OF A MAJOR CHILD NEGLECT PROBLEM 24-25 (1987). Jones studied 807 cases of child abuse or neglect reported to the New York State Central Register for Child Abuse and Maltreatment between July 1, 1982, and June 30, 1983. *Id.* at 3-6. Social workers reviewed ninety-nine of the case records in depth and concluded that in fifteen percent of those cases, the parent left the child unattended because of the "parent's negative attitude towards the child." *Id.* at 24. For a concrete example of this phenomenon, see *Harrington v. State*, 547 S.W.2d 616, 618 (Tex. Crim. App. 1977). In a statement given to police after her arrest for allowing her two-year-old daughter to starve to death, the defendant said "she was a 'bad mother' and just did not like small children." *Id.* at 618.

143. U.S. DEP'T OF HEALTH & HUMAN SERVS., A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES 123 (1995) (citing studies); see also MYERS, *supra* note 22, at 152

Other parents lack an ability “to be sensitive to a child’s needs and to meet those needs.”¹⁴⁴ Even parents who do not act out of deliberate malevolence may abuse or neglect their children because their background or personality characteristics simply render them ill-equipped to undertake the enormously demanding job of parenting. James Gaudin, for example, in his comprehensive 1993 report on child neglect issued by the Department of Health and Human Services, noted that studies have found that neglectful parents “lack knowledge of and empathy for children’s age-appropriate needs” and “have more unrealistic and more negative expectations of their children than nonneglecting parents.”¹⁴⁵

Therapy and support services can play a significant role in remedying some of these problems. Parenting classes, for example, can educate parents about what childhood behaviors are appropriate for each stage of development. Better support systems, such as high quality and affordable daycare, are critically important and could help reduce some of the stresses associated with parenthood. We must confront the reality that our society does a terrible job of supporting caregiving,¹⁴⁶ and we must focus more of our efforts and resources on “early warning and prevention, to the extent possible.”¹⁴⁷ But we also should acknowledge that while therapy and social services may help *prevent* future physical and sexual abuse, they do not adequately *redress* that abuse after it has already occurred.

In other words, this Article suggests that we must take a two-pronged approach: first, we must do a better job of supporting families and taking steps to ensure that abuse does not occur in the first instance, and second, if abuse has occurred despite our best efforts, we must take off the rose-colored glasses we currently wear regarding the parent–child relationship and give serious consideration to the use of prosecution to redress that wrong. Giving consideration to the use of the criminal justice system is important because “morality demands that *the state* inflict retribution for

(“[S]ome adults hurt children on purpose. A few are psychopaths, and fewer still are sadists who enjoy inflicting pain. Most adults who deliberately hurt children are simply bullies.”).

144. Goldman, *supra* note 141, at 42.

145. JAMES M. GAUDIN, JR., U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD NEGLECT: A GUIDE FOR INTERVENTION 15 (1993). Gaudin adds that “[m]any neglectful mothers are indeed psychologically immature and childlike in their inability to consider the needs of others, postpone gratification of basic impulses, and to invest themselves emotionally in another person.” *Id.* at 14; see also NORMAN POLANSKY ET AL., DAMAGED PARENTS: AN ANATOMY OF CHILD NEGLECT 39, 40, 110–11 (1981) (noting that a significant percentage of neglectful parents suffered from a syndrome he called “apathy-futility” syndrome, which is marked by, *inter alia*, “feeling[s] of futility” and “lack of competence in many areas of living”).

146. See, e.g., MARTHA FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 36–38 (2004).

147. JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION 88 (1998); see also Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1493 (2007) (arguing that “a truly effective child welfare system . . . would seek to prevent child abuse and neglect”).

certain serious moral wrongs.”¹⁴⁸ Greater use of the criminal justice system has the potential to shape a powerful normative message that violence perpetrated by parents against their children is as blameworthy as violence perpetrated by strangers, and that protecting family privacy cannot take precedence over protecting the lives of society’s youngest and most vulnerable victims.

This is emphatically not to suggest that greater use of the criminal justice system would be problem free. As we have seen in the context of spousal abuse, the criminal justice system often represents an “imperfect solution[.]” to the problem of intimate violence.¹⁴⁹ Thus, increased criminalization must not happen in a vacuum. We must provide better support for American families. We must also be more sensitive to the needs of children who have been victimized and “return the *child’s* voice to the ‘child welfare’ system.”¹⁵⁰ But as Part II of this Article demonstrated, the criminal justice prong of a “coordinated community response” to the problem of violence against children is currently underutilized, and we must grapple with the question of whether greater criminalization can play more of a role in better protecting our children.¹⁵¹

2. Parental Offenders Have “Suffered Enough”

One oft-repeated objection to prosecuting parents who have lost a child is that prosecution is unnecessary because the parent has already suffered enough due to the loss itself, and therefore, any additional suffering imposed by the criminal justice system is simply gratuitous and cruel.¹⁵² It is certainly true that for many individuals there can be no greater pain than

148. Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1701 (1992) (emphasis added).

149. ELIZABETH SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 185 (2000). Professor Schneider’s book contains an important and detailed discussion of the ambivalence many feminists feel about greater criminalization of domestic violence. I believe that some of the concerns regarding greater criminalization of spousal violence are not present to the same extent in cases involving violence against children. For example, “the necessity to preserve a woman’s autonomy from excessive state intervention” is not as significant a concern if a child is the victim—a child obviously does not possess autonomy interests in the same way as an adult. *Id.* at 184. Young children do not have the ability to decide what kind of actions—for example, not prosecuting a case criminally but instead fleeing to a shelter or obtaining a civil protection order—would best protect them from future violence.

150. Marcia Sells, *Child That’s Got Her Own*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE*, *supra* note 24, at 130, 145 (emphasis added) (suggesting that we must increase our efforts to listen to and respect an individual child’s needs).

151. Donna Coker, *Enhancing Autonomy for Battered Women: Lessons from Navajo Peacemaking*, 47 UCLA L. REV. 1, 48–49 (1999) (describing how in an ideal “coordinated response, criminal sanctions are accompanied by strong supports for battered women”); *see also* SCHNEIDER, *supra* note 149, at 187 (discussing Coker’s article).

152. I discussed the relevance of parental suffering extensively in a prior article. *See* Collins, *supra* note 121, at 832–46.

the loss of a child and that the suffering endured by parents who face that tragedy is almost unimaginable. This Article, however, focuses primarily on parents who intentionally commit the most heinous crimes against their children—the crimes of murder and rape. In those particular contexts, I would suggest that parental suffering should be irrelevant to the decision about whether to employ the sanctions of the criminal justice system. To suggest otherwise would mean that we should grant mercy to the husband who murdered his wife because he is now a widower or to the child who killed her parents because she is now an orphan.

Even in cases where a child dies because of negligence, rather than intentional conduct, allowing suffering to be the dominant factor in the decision about whether to prosecute a parent undermines the value of the life of the child victim in the eyes of the law. When we suggest that mercy is warranted in a case where the victim is the defendant's own child, presumably we would not extend the same mercy to a stranger who kills a child—indeed, we view crimes against children as the most reprehensible of offenses. In either case, however, the nature of the conduct is the same—the taking of life—and the amount of harm caused is exactly the same—the loss of an innocent life. The primary differences between the two scenarios are the degree of personal relationship between the offender and the victim and the extent to which that relationship, or lack thereof, causes the offender to feel guilt, remorse, or pain as a result of the crime. To argue that killing a child relative warrants less punishment than killing a child stranger is to diminish the worth and importance of the life of that first victim.¹⁵³

Thus, emphasizing the importance of parental suffering to such an extent elevates the suffering of the parent over the worth of the life of the child in the calculus about whether to seek redress through the criminal justice system. The fact that a parent is feeling emotional pain is given greater weight than the fact that a child's life has unjustifiably been lost. This is a classic example of a parent-centered view of family life that so often permeates the criminal law—yet another illustration of our belief that love, not law, and the pain that results from the loss of a loved one are sufficient both to protect children in the first instance and to sanction those who ultimately fail to protect.

3. Parental Offenders Are Less Dangerous

In absolute terms, of course, intrafamilial offenders pose the most danger to children in homicide cases, rather than the least danger. Many more young children die at the hands of family members than at those of

153. Cf. ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 73 (1976) ("Understating the blame [involved in a criminal offense] depreciates the values that are involved: disproportionately lenient punishment for murder implies that human life—the victim's life—is not worthy of much concern . . .").

acquaintances or strangers. In 2002, nearly two-thirds of all murder victims under the age of thirteen were killed by a family member.¹⁵⁴ Another federal report concluded that 872,000 children were the victims of abuse or neglect in this country in 2004; approximately 79% of the perpetrators of that maltreatment were parents.¹⁵⁵ This study also concluded that one or both parents caused 78.9% of the 1,490 child fatalities in 2004.¹⁵⁶

As for sexual abuse, strangers commit only 10% of child rapes.¹⁵⁷ For children under the age of twelve, more than 80% of reported sexual assaults were committed in the child's home.¹⁵⁸ Estimates as to what percentage of these assaults parents commit vary; one government study concluded that "just over one-fourth [of sexually abused children] were sexually abused by a birth parent."¹⁵⁹ A particularly interesting finding of this study was that "a sexually abused child was most likely to sustain a serious injury or impairment when a birth parent was the perpetrator."¹⁶⁰

Even if parental offenders as a class pose the most danger to children, perhaps parental offenders are less dangerous than other offenders on an individual basis, both because they are less likely to reoffend and, if they do reoffend, they are unlikely to select targets outside the family.¹⁶¹ In the

154. See DUROSE ET AL., *supra* note 3, at 18.

155. ADMIN. ON CHILDREN, YOUTH & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2004, at xiii, xviii (2006) [hereinafter CHILD MALTREATMENT 2004], available at <http://www.acf.hhs.gov/programs/cb/pubs/cm04/cm04.pdf>.

156. *Id.* at 65–66.

157. Kim English et al., *Sex Offender Containment: Use of the Postconviction Polygraph*, 989 ANNALS N.Y. ACAD. SCI. 411, 412 (2003); see also Jon Conte, *The Incest Offender: An Overview and Introduction*, in THE INCEST PERPETRATOR: A FAMILY MEMBER NO ONE WANTS TO TREAT 19, 19 (Anne L. Horton et al. eds., 1990) ("[C]hildren are more likely to be sexually abused by members of their own families and by acquaintances than by strangers.").

158. English et al., *supra* note 157, at 412.

159. ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEP'T OF HEALTH & HUMAN SERVS., THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT: FINAL REPORT 8–12 (1996). Rose Corrigan reports that "[i]ncest offenses . . . constitute approximately 46 percent of convictions for sexual assaults committed against children." Corrigan, *supra* note 84, at 291 (emphasis omitted).

160. SEDLAK & BROADHURST, *supra* note 159, at 8–13; see also LAWRENCE GREENFELD, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS 12 (1997) (reporting that about "a quarter of parent-child rapes resulted in major injury," defined as "severe lacerations, fractures, internal injuries, or unconsciousness").

161. See, e.g., Leonore Simon, *Legal Treatment of the Victim-Offender Relationship in Crimes of Violence*, 11 J. INTERPERSONAL VIOLENCE 94, 95 (1996) (describing "public opinion that is more fearful of stranger violence" and stating that "stranger offenders are perceived to be more dangerous, unpredictable, and indiscriminate in their selection of victims compared to nonstranger offenders"). It is important to note that the question of recidivism rates for any type of sexual offender continues to be controversial. Compare, e.g., Ron Langevin et al., *Lifetime Sexual Offender Recidivism: A 25-Year Follow-Up Study*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 531, 548 (2004) (concluding that approximately three in five sex offenders committed another sexual offense), with Cheryl M. Webster et al., *Results by Design: The Artefactual Construction of High Recidivism Rates for Sex Offenders*, 48 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 79 *passim*

context of sexual abuse, for example, some opponents of prosecution argue that sexual abusers who victimize family members are less dangerous because they are more amenable to treatment.¹⁶² For example, consider the following comments made by Deborah Johnson, a clinical psychologist who runs an organization called Parents United International, which conducts offender recovery programs:

"Incest is the most treatable offense on the books . . . Most incest offenders are not pedophiles. Fixated offenders are predatory toward children, but these [pedophiles] are in the minority. The majority of incest offenders are what we call regressed offenders, people who, for example, under stress, turn to kids. When you've had a crappy day at work and your boss yelled at you, and your little 5-year-old pats you on the cheek and says how much she loves you, if you have really bad self-esteem—and if your boundaries are poor and you confuse sex with affection—it's not a huge leap to incest."¹⁶³

What a remarkable example of the tendency to minimize the severity of intrafamilial sexual abuse! However, researchers are increasingly rebutting these assumptions, concluding instead that "it used to be assumed that incest offenders could be clearly separated from other child molesters, but

(2006) (criticizing the Langevin study). Interestingly, Langevin concluded that incest offenders "showed higher recidivism rates than generally reported in the literature, with one in two reoffending based on sex offense convictions . . . Their recidivism rates did not differ significantly from those of other sex offender groups when undetected sex crimes were included in the analysis." Langevin, *supra*, at 549. *But see* Roger Hood et al., *Sex Offenders Emerging from Long-Term Imprisonment*, 42 BRIT. J. CRIMINOLOGY 371, 392 (2002) (concluding that intrafamilial sex offenders are less likely than other sex offenders to be reconvicted of another offense). Hood does acknowledge that this finding may be explained in part "due to the difficulties of securing convictions rather than a decline in actual sexual reoffending." *Id.* This would seem particularly likely in incest cases because of the difficulties involved in securing convictions.

162. See Andrew, *supra* note 49, at 1873–74. To support this point, Andrew cites a position paper by the Association for the Treatment of Sexual Abusers that claims incestuous offenders have fewer victims and have lower rates of recidivism than extrafamilial offenders. *See id.* at 1874 n.120 (citing Ass'n for the Treatment of Sexual Abusers, Pedophiles and Child Molesters: The Differences, available at <http://atsa.com/ppPedophiles.html>); *see also* David Greenburg et al., *Recidivism of Child Molesters: A Study of Victim Relationship with the Perpetrator*, 24 CHILD ABUSE & NEGLECT 1485, 1490 tbl.3 (2000) (reporting the results of a Canadian study and concluding that men who abused a biological child or stepchild were less likely to be charged with a new criminal offense than men who abused an acquaintance or stranger). It is important to note, however, that the study deliberately excluded offenders who offend across relationship categories, *see* Greenburg et al., *supra*, at 1487, while the studies discussed below suggest these crossoffenders constitute a significant percentage of parental offenders. *See infra* notes 164–66 and accompanying text. Further, the Greenburg study concluded that nineteen percent of "pure" parental sex offenders were ultimately charged with a new criminal offense of some type. Greenburg et al., *supra*, at 1490 tbl.3.

163. Goodwin, *supra* note 48, at 348 (quoting Deborah Johnson, Parents United Int'l).

current evidence indicates that a substantial percentage of molesters offend in both spheres.”¹⁶⁴ One recent study that looked at, inter alia, 104 incest offenders found that two-thirds of the offenders in that group “‘crossed over’ relationship categories,” meaning they assaulted both victims who were strangers and victims to whom they were in a “position of trust.”¹⁶⁵ Another study of sixty-five fathers who had molested their biological children found that one-third had molested outside the home, and eighty percent had abused more than one victim.¹⁶⁶ Thus, some research suggests that incest offenders have the potential to reoffend and the potential to harm children both in and outside their families.

The arguments in favor of disparate treatment also ignore the particular harms associated with incest offenses. Parental incest, by definition, is perpetrated by the very individual who is supposed to protect a child from harm, not inflict it. Because of a parent’s special position of power over a child, parental abuse may inflict the most psychological damage.¹⁶⁷ Moreover, incest can often go on for years, as compared to an undeniably horrific, but typically one-time, incident of abuse inflicted by a stranger.¹⁶⁸ Sexual abuse perpetrated by a family member is also less likely to be discovered, meaning that many victims will suffer silently without ever receiving therapeutic or law-enforcement resources to help redress the wrongs they have suffered.¹⁶⁹

164. Judith V. Becker, *Offenders: Characteristics and Treatment*, FUTURE CHILDREN, Summer-Fall 1994, at 176, 177; see also NAT’L CTR. FOR PROSECUTION OF CHILD ABUSE, *supra* note 101, at 176 (citing Becker). Becker cites a study concluding that approximately forty-nine percent of the 159 incest offenders interviewed had also been involved in “nonincest female pedophilia.” Becker, *supra*, at 180; see also Ian Barsetti et al., *The Differentiation of Intrafamilial and Extrafamilial Heterosexual Child Molesters*, 13 J. INTERPERSONAL VIOLENCE 275, 283 (1998) (“Intrafamilial and extrafamilial child molesters showed very similar sexual interests . . .”).

165. English et al., *supra* note 157, at 420; see also Peggy Heil et al., *Crossover Sexual Offenses*, 15 SEXUAL ABUSE: J. RES. & TREATMENT 221, 232 (2003) (“[Sixty-four percent] of [the 223] inmates [studied] known to victimize relative children also admitted victimizing nonrelative children.”).

166. See K.C. Faller, *Sexual Abuse by Paternal Caretakers: A Comparison of Abusers Who Are Biological Fathers in Intact Families, Stepfathers, and Non-Custodial Fathers*, in THE INCEST PERPETRATOR: A FAMILY MEMBER NO ONE WANTS TO TREAT, *supra* note 157, at 67; see also Mark R. Weinrott & Maureen Saylor, *Self-Report of Crimes Committed by Sex Offenders*, 6 J. INTERPERSONAL VIOLENCE 286, 292 (1991) (finding that “9 of 18 known incest offenders admitted to undetected abuse of a child outside the home,” and “34% of the men known only to have molested outside the home also perpetrated incest”).

167. See generally ANN M. HARALAMBIE, CHILD SEXUAL ABUSE IN CIVIL CASES 7 (1999) (describing “many ways [in which] intrafamilial sexual abuse is more devastating to children than molestation by a stranger”).

168. See Corrigan, *supra* note 84, at 291; see also Zimring, *supra* note 8, at 533 (“The tendency of family violence to represent a continuing threat to the victim’s safety may justify both more vigorous enforcement efforts and somewhat more serious sanctions than assaults between strangers . . .”).

169. See, e.g., English et al., *supra* note 157, at 412 (citing one study that found that children were 3.69 times more likely to disclose sex abuse when the abuse was perpetrated by a stranger

Another reason for the disparity in treatment, although obviously not a justification for it, is the fact that "[i]n the United States, cultural beliefs about child sexual abuse appear to rest on a handful of persistent stereotypes."¹⁷⁰ Lynne Henderson makes a number of observations in this regard. Perhaps the most dominant myth is that of the sexual-predator stranger: the notion of "strangers in cars lurking around schoolyards."¹⁷¹ Other myths and stereotypes persist as well. For example, Henderson argues that "[p]erhaps as part of a tendency to project a negative sexuality onto others, members of the dominant culture may consider members of 'outsider' groups—gays and lesbians, Roman Catholic priests—to be likely sexual abusers."¹⁷² She also suggests that we associate incest with "stereotypes of Kentucky hill people and other marginal (and poor) groups."¹⁷³ As long as we cling to the myth that sexual abuse is primarily perpetrated by strangers and outsiders, why would legislators worry about whether parents are receiving preferential treatment?

B. THE CRIMINAL JUSTICE SYSTEM IS NOT THE MOST EFFECTIVE APPROACH

1. Breaking Up the Family Unit Should Be Avoided

Another set of justifications relates to concerns about the family unit itself: incarcerating the offender breaks up a family, perhaps depriving it of its primary breadwinner in the process. I would suggest that this kind of justification is an example of the rose-colored view of parenthood I criticize, where we persist in believing, for example, that a victim of incest is generally

rather than a family member and another that found that only two percent of incest crimes were reported to authorities). Improving the protection of children through increased victim-reporting rates is another important issue, but this is a complex and difficult question that is beyond the scope of this Article.

170. Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL'Y & L. 479, 490 (1997). Jon Conte suggests another reason behind "society's viewing [of] the incestuous and nonincestuous offender in different terms." Conte, *supra* note 157, at 26. He points to "[a]dult narcissism, which identifies with the adult rather than the child" and suggests that "[m]any of us, when viewing the adult members of our families and communities who abuse their own children, and noting the resemblance between those adults and ourselves, tend to over identify with the offender and thereby minimize what they do." *Id.* at 27.

171. Henderson, *supra* note 170, at 490. This stereotype is hardly recent. Linda Gordon, for example, argues:

Starting early in the twentieth century, incest was reinterpreted through a double process of reconstituting the victim and the assailant. . . . The culprits were redefined, first, as neglectful mothers, who failed to insulate their daughters from sexual experience, and, second, as men-in-the-street, sexual deviants, or 'perverts,' strangers to their victims. Both redefinitions served to withdraw scrutiny from family relationships

LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE—BOSTON 1880–1960*, at 215 (1988).

172. Henderson, *supra* note 170, at 490.

173. *Id.*

better off remaining in an intact family unit with the offender still in the home.¹⁷⁴

We need to unpack this objection a bit more—there are several different lines of argument running through this particular issue. Perhaps the most fundamental is the resistance to state interference in the private realm of the family. As Katharine Bartlett has written, “We want a society in which parents share the highest norms of what the parent-child relationship should be, but we also want parents to be free to raise their children their own way.”¹⁷⁵ That is in part because if you are going to undertake the enormously demanding job of parenthood, we believe that you should enjoy some autonomy in the way you perform that job in return.¹⁷⁶

It is unquestionably true that the state must and should refrain from intervention in the family to some extent. Obviously, most Americans do not want a world where the state intervenes in the marital bedroom to prohibit certain decisions about contraceptive use or intervenes in the parent-child relationship to prohibit certain kinds of decisions about schooling or what language a family speaks at home. However, to borrow a phrase from Elizabeth Schneider, who was speaking of the spousal relationship, “the concept of freedom from state intrusion . . . takes on a different meaning when it is violence” that goes on in the relationship.¹⁷⁷ This Article is focused on those cases where a parent intentionally murders or rapes a child. In those scenarios, I believe that a parent has simply forfeited the right to invoke the shield of family privacy against state intervention.

Even if the state should be able to interfere in the family under some circumstances, perhaps the criminal justice system is simply the wrong approach. Critics raise this particular argument with the most vigor in the

174. In her recent study of the incest exception in California, Ruby Andrew cites an article from the *Los Angeles Times* that discusses the testimony of a psychologist before the California legislature in 1981, when the legislature was considering revisiting the incest exception. See Andrew, *supra* note 49, at 1878 n.136 (citing Jane Stevens, *Ending An Awful Irony*, L.A. TIMES, Jan. 25, 2006, at B11). The article reports psychologist Hank Giarretto's testimony that “lawmakers needed to be careful that the ‘father offender’ who ‘had, usually, a very outstanding career both in industry and in his place in the community,’ was not mixed up ‘with the type of offender, the predator, the type of fellow who stalks his victims or who sets up situations through which he can molest these children.’” Stevens, *supra*; see also Andrew, *supra* note 49, at 1878–79 (“Defenders [of the incest exception] encouraged the legislature to treat intrafamilial child sexual abuse as a family dysfunction that could be resolved through therapy” and “urged legislators to prioritize ‘family reunification services.’” (internal footnotes omitted)).

175. Katharine Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 292, 297 (1988).

176. See Scott & Scott, *supra* note 7, at 2456 (“[P]arental authority and discretion are the necessary quid pro quos for parents undertaking the responsibility of parenthood.”). The Scotts add that “[l]egal protection of parental rights and authority serves as an important form of compensation for fulfillment of parental obligations and thus functions to serve the child's interest in receiving good care from her parents.” *Id.* at 2463.

177. Schneider, *supra* note 46, at 974; see also SUSAN MOLLER OKIN, JUSTICE, GENDER AND THE FAMILY 129 (1989) (“The privacy of home can be a dangerous place, especially for women and children.”).

context of sexual abuse cases. For example, perhaps the criminal law is too "blunt and adversarial" a system and "is poorly equipped to cope with the social and psychological dimensions of child sexual abuse."¹⁷⁸ Perhaps a therapeutic approach, rather than a criminal one, would be more efficacious in healing victims and keeping families together. Further, "the threat of prosecution [might] cause abusive adults to hide their deviance rather than seek desperately needed professional help."¹⁷⁹

To address this argument, it is necessary to consider the impact of the criminal justice system on victims, on defendants, and on the family unit. In terms of victims, it is certainly true that the criminal justice system has the potential to inflict still more trauma on children who have been the victims of sexual abuse.¹⁸⁰ Imagine how frightening it must be for a young child to take the witness stand in front of a courtroom full of strangers and relate painful details of abuse while the individual who inflicted that abuse is watching. However, the answer to this problem is not to avoid the criminal justice system entirely; the answer is to make the criminal justice system more accommodating. There have already been tremendous strides in this regard—many jurisdictions have created child-advocacy centers, for example, that help prepare children for testimony and provide support and counseling throughout the criminal justice process.¹⁸¹ Further, concerns about the traumatizing impact of courtroom testimony are a bit overblown in light of the fact that the overwhelming majority of criminal cases are resolved via a plea bargain rather than through a trial.¹⁸²

In terms of defendants, it seems highly unlikely that eliminating the threat of criminal prosecution or mandatory reporting requirements would suddenly induce incest offenders to rush into therapy on their own initiative.¹⁸³ Rather, the enforcement mechanisms available through the criminal justice system have the potential to compel an offender to complete a therapeutic treatment program.¹⁸⁴ Another concern related to defendants

178. Myers, *supra* note 107, at 91. In his article, Myers summarizes the arguments of those who criticize prosecution, rather than endorse them.

179. *Id.*

180. See, e.g., Eli Newberger, *Prosecution: A Problematic Approach to Child Abuse*, 2 J. INTERPERSONAL VIOLENCE 112, 116 (1987) (arguing that "[p]rosecution punishes the victim" because the "courtroom process attaches evil, excitement, and mystery to forbidden sexual acts").

181. For a discussion of child-advocacy centers, see generally Nancy Chandler, *Children's Advocacy Centers: Making a Difference One Child at a Time*, 28 HAMLINE J. PUB. L. & POL'Y 315 (2006).

182. See COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2002, at 61 (Brian J. Ostrom et al. eds., 2003), available at http://www.ncsconline.org/D_Research/csp/2002_Files/2002_Full_Report.pdf ("Approximately 3 percent of state criminal cases were resolved by trial in 2001.").

183. See Myers, *supra* note 107, at 91.

184. See, e.g., James Peters, Janet Dinsmore & Patricia Toth, *Why Prosecute Child Abuse?*, 34 S.D. L. REV. 649, 654 (1989) ("[T]he court can order offenders into treatment programs in an

is that criminal prosecution will have an unnecessarily stigmatizing effect because "father offenders" typically are otherwise respected members of their communities.¹⁸⁵ The simplest and most powerful response to this argument is that offenders who abuse their own children deserve to be stigmatized. We must acknowledge that because of parents' unique responsibilities to care for and protect their children, victimizing their own child makes their crime *more* blameworthy, rather than less so.

In terms of the family unit, critics of prosecution argue that use of the criminal justice system can impose unjustified suffering on the offender's family.¹⁸⁶ For example, depriving a family of the primary breadwinner surely can have devastating socioeconomic consequences. But this is true in every criminal case. Every criminal defendant is someone's child or parent or spouse or sibling. We typically do not allow the fact that a prison sentence might deprive a family of its primary breadwinner to preclude prosecution for a violent defendant who kills or rapes a stranger. Why should it suddenly become a dispositive consideration in a case where a defendant inflicts the same harm on a family member?

Two additional points bear mentioning. First, this Article is not intended to suggest that families should always be permanently disrupted in cases involving physical or sexual abuse. The question of whether family preservation is an appropriate goal of child-protection efforts is a tremendously complicated one.¹⁸⁷ Child-welfare authorities must take a hard, unbiased look at whether a child victim would be better off with the offender in or out of the home and solicit the input of the child victim on that issue. Second, it is critically important to recognize that greater use of the criminal justice system cannot happen in a vacuum. As Elizabeth Pleck has argued, "[C]riminalizing family violence can only go so far before the family must be provided with other economic resources."¹⁸⁸ We must recognize that society bears a collective responsibility to ensure that children who have been the victims of physical or sexual abuse, and surviving siblings

attempt to modify deviant sexual interests or other abusive behavior and reduce the likelihood of recidivism . . .").

185. See *supra* note 174 (describing the statement of psychologist Hank Giarretto).

186. See, e.g., Thomas, *supra* note 22, at 341 (arguing that even in cases of physical abuse, prosecution of parents is usually not appropriate because "[f]ines reduce limited family financial abilities" and "[i]mprisonment separates parent and child"); Ann-Marie White, *A New Trend in Gun Control: Criminal Liability for the Negligent Storage of Firearms*, 30 HOUS. L. REV. 1389, 1423 (1993) (arguing that parents should not be imprisoned if a child dies due to parental negligence because this "serves as a double penalty on the family").

187. For some sense of the debate over the question of family preservation, compare BARTHOLET, *supra* note 30, at 7, decrying the "blood bias" that lies "at the core of current child welfare policies," with DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE*, at viii (2002), decrying the "injustice of a system that separates thousands of Black children from their parents every year and relegates them to damaging state institutions."

188. PLECK, *supra* note 24, at 203. Pleck further notes that "a policy against family violence is only as far-reaching as the alternatives to the traditional family it makes available." *Id.*

of a child who has been murdered by a parent, have a social and economic "safety net" in the event the offender is incarcerated.¹⁸⁹ Families need access to counseling, child care, health care, housing, and other community resources in order to ensure that victims have the opportunity to reclaim their lives.¹⁹⁰ Providing these resources will undoubtedly be expensive, but the expense surely is worthwhile if we are serious about protecting our children.

2. Increased Use of the Criminal Justice System Will Have a Disparate Impact on the Poor and People of Color

The concern that greater use of the criminal justice system will have a disparate impact on the poor and people of color is absolutely valid. We must acknowledge and address the potential disparate impact of any proposed reform on members of socioeconomically disadvantaged groups. We have far too often "trampled on the domestic life of the poor" and minority groups in our efforts to protect children.¹⁹¹ In the particular scenario at the heart of this Article, we encounter the intersection of two institutions with profound racial and class implications: the child-welfare system and the criminal justice system.¹⁹² As Susan Brooks and Dorothy Roberts have argued, "The child welfare system is marked by striking class

189. See Mary Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13, 31 (1995).

190. See *id.* at 31–32; see also JANE WALDFOGEL, *THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT* 223–28 (1998) (describing how we must involve more "community partners" in child-protection efforts).

191. PLECK, *supra* note 24, at 12. Pleck further notes that "assistance has also been accompanied by efforts at social control and class domination." *Id.*

192. It is important to note that historically many elements of society tended to minimize the importance of the parent–child relationship for Native-American and African-American families. See, e.g., Annette Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L.J. 141, 145 (2004) (describing how the family bonds of Native-American families "have been subject to brutal disruption"); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, in *FEMINIST LEGAL THEORY: FOUNDATIONS* 371, 375 (D. Kelly Weisberg ed., 1993) ("[T]he role of Black women as mothers to their own children often goes unrecognized and is sometimes actively ignored and discouraged."); Patricia Williams, *On Being the Object of Property*, in *FEMINIST LEGAL THEORY: FOUNDATIONS*, *supra*, at 594, 594, 598 (describing her family's personal experience with children being separated from their parents).

and race disparities.”¹⁹³ In addition, scholars have extensively documented the racism that runs through the criminal justice system.¹⁹⁴

An initial response is that we are already seeing rampant racism in the criminal justice system in regard to these cases in a very different sense. Remember those six or seven homicides in the District of Columbia every year that I referenced at the start of the paper?¹⁹⁵ These lost victims are no doubt being ignored not only because they are child victims, but also because many are victims of color.¹⁹⁶ Indeed, the overwhelming majority of the highly publicized cases in the past several years involved white victims: Adam Walsh, Polly Klaas, JonBenet Ramsey, and Megan Kanka, to name just a few. More vigorous prosecution of offenders who victimize their own children will vindicate the rights of child victims of color whom society currently overlooks.¹⁹⁷

In addition, the possibility that more vigorous prosecution may have a disparate impact on members of poor and minority groups does not mean that we should not try in the first instance to hold parents more accountable; it means, instead, that we must be vigilant to guard against racism and classism in making legislative and law-enforcement decisions. We must acknowledge and confront the reality that prosecutorial decision making, for example, may “reflect race, class, and gender biases of prosecutors who have tended to be white, middle-class, and male.”¹⁹⁸ Policymakers and law-enforcement officers therefore should engage in critical self-analysis when making legislative and law-enforcement determinations and consider whether any of these biases are affecting their decision making. Nonetheless, as long as the plight of children suffering from physical and sexual abuse

193. Susan Brooks & Dorothy Roberts, *Family Court Reform*, 40 FAM. CT. REV. 453, 453 (2002); see Annette Appell, *Protecting Children or Punishing Mothers: Gender, Race and Class on the Child Protection System*, 48 S.C. L. REV. 577, 584 (1997) (arguing that “[t]he mothers and children ‘served’ by the public, [child] protective system are overwhelmingly poor and disproportionately of color”); see also ROBERTS, *supra* note 187, at 10–25 (describing the “system’s inferior treatment of Black children”). Roberts argues that “Black children make up nearly half of the national foster care population, even though they represent fewer than one-fifth of the nation’s children” and that “[p]overty—not the type or severity of maltreatment—is the single most important predictor of placement in foster care.” *Id.* at vi, 27.

194. See generally Dan M. Filler, *Silence and the Racial Dimension of Megan’s Law*, 89 IOWA L. REV. 1535 (2004); Samuel R. Gross & Robert Mauro, *Patterns of Death*, 37 STAN. L. REV. 27 (1984).

195. See *supra* text accompanying note 5.

196. See, e.g., CHILD MALTREATMENT 2004, *supra* note 155, at 66. For child fatalities in 2004, 43.2% were white, 27.2% were African-American, 18.6% were Hispanic, and 4.8% were American Indian, Alaska Native, Asian, Pacific Islander, “other,” or mixed-race. *Id.*

197. See Randall Kennedy, *The State, Criminal Law, and Racial Discrimination: A Comment*, 107 HARV. L. REV. 1255, 1256 (1994) (“[T]he main problem confronting black communities in the United States is not excessive policing and invidious punishment but rather a failure of the state to provide black communities with the equal protection of the laws.”).

198. Murphy, *supra* note 40, at 719 (quoting Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75, 98–99 (1993)).

continues, we must try to use available resources to protect them from harm and condemn those who harm them when prevention efforts fail.

IV. GOING FORWARD

How can we better protect our children in the future? As an initial matter, there are concrete legislative steps we could take to vastly improve the lives of many children. More fundamentally, we need to reorient our thinking toward the home if we truly want to protect our children from harm. Love is simply not enough to protect our children; the law must also play a role.

A. LEGISLATIVE REFORMS

One obvious fix is to eliminate the incest loopholes that pervade so many state statutory schemes.¹⁹⁹ Offenders who victimize child relatives should not receive preferential treatment as compared to offenders who victimize acquaintances or strangers. New York, North Carolina, Illinois, and California recently eliminated these loopholes.²⁰⁰ To fix this problem, states could take several different approaches. For example, North Carolina changed incest from a Class F felony to a Class B1 felony.²⁰¹ Illinois's new law eliminates the possibility of probation for sexual assault offenses, regardless of the relationship between the defendant and his victim.²⁰² While completely eliminating the possibility of probation for any sex offense may go too far, the general idea makes sense: parents should not receive a sentencing discount for intentionally committing a physical or sexual assault against a child solely because of their status as parents. Instead, considerations such as the offender's prior record and the extent to which the assault was violent should drive the sentencing decision—considerations that would be applicable across all classes of cases.

Here is a far more radical reform proposal: I would endorse a statute forbidding parents to use corporal punishment against their children because I believe that our continued acceptance of this practice contributes to the more serious forms of violence perpetrated against children that are at the heart of this Article.²⁰³ To be sure, I recognize that this proposed

199. See *supra* notes 49–80 and accompanying text.

200. See, e.g., *supra* note 81 and accompanying text (discussing the elimination of the loophole in New York).

201. See Act of Sept. 23, 2002, No. 119, 2002 N.C. Sess. Laws 280 (codified at N.C. GEN. STAT. §§ 14-178, -179 (2005)).

202. See Press Release, Nat'l Ass'n to Protect Children, Illinois to Eliminate Child Sexual Abuse Loophole (May 30, 2003), available at <http://www.protect.org/articles/illinois.shtml>.

203. See MYERS, *supra* note 22, at 147 ("The problem with corporal punishment is that tolerating the practice at all guarantees that some adults will misuse it, maiming and killing children. Corporal punishment is a major contributor to child abuse."). Indeed, perhaps this proposal is becoming more mainstream: a state legislator in California recently introduced a bill banning the spanking of children under the age of three. See, e.g., Ilene Lelchuk, *Bid to*

principle will be tremendously controversial, especially in light of the fact that approximately ninety percent of Americans continue to spank their children despite the prevalence of research opposed to the practice.²⁰⁴ However, it is hardly a novel proposal; at least twelve other countries have outlawed all use of corporal punishment against children, including Great Britain, Sweden, Finland, Norway, Germany, and Italy.²⁰⁵

Of course, prosecutors' offices do not have the resources to prosecute every parent who spanks a toddler, just as they do not prosecute all minor assaults committed against adults.²⁰⁶ In Sweden, for example, the government prosecutes parents "only in cases that [otherwise] meet the criteria of assault"; the law that forbade the use of corporal punishment contained no independent criminal penalties.²⁰⁷ If we make a clear legal statement that spanking is illegal, presumably many parents will conform to the law and stop spanking. Such a rule will also make prosecution decisions simpler in cases where serious physical injury does result.²⁰⁸ Now, prosecutors have to try to parse out acceptable motives for the use of corporal punishment from the unacceptable ones and determine whether the parent really was engaged in discipline or just offering a post hoc rationalization to justify abusive conduct that in fact arose out of rage or some other motivation.

The most important reason for prohibiting the use of force against children is to change our cultural mindset. We live in a country where hitting children continues to be a "'normal' part of child-rearing."²⁰⁹ Contrast our beliefs in this regard to our current beliefs regarding the physical abuse of women, where hitting is no longer considered an

Outlaw Spanking Stirs Emotions: Mountain View Lawmaker's Plan Faces an Uphill Fight, S.F. CHRON., Jan. 30, 2007, at A1.

204. See Pollard, *supra* note 128, at 577 (discussing the prevalence of spanking in the American childrearing process).

205. See *id.* at 587. Pollard reports that "Finland, Norway, Austria, Cyprus, Italy, Croatia, Latvia, the United Kingdom, Denmark, Israel, and Germany" have all banned spanking completely and a number of other countries have legislation pending, including "Switzerland, Poland, Spain, Scotland, Canada, Jamaica, New Zealand, Namibia, South Africa, Sri Lanka, the Republic of Ireland, and Belgium." *Id.*

206. See *id.* at 591 (citing a statement by the National Children's Bureau in Great Britain after a judicial decision barring parental corporal punishment).

207. Joan Durrant, *The Swedish Ban on Corporal Punishment: Its History and Effects*, in FAMILY VIOLENCE AGAINST CHILDREN 19, 21 (Detlev Frehsee, Wiebke Horn & Kai-D. Bussman eds., 1996). Durrant further argues that "[t]he law was intended as a guideline for parents to follow and as a means of changing attitudes towards the use of force in childrearing." *Id.* at 21-22.

208. See PLECK, *supra* note 24, at 76-77 ("The perennial difficulty for reformers against child abuse lies in drawing the line between legitimate corporal punishment and child cruelty."). Ending the legitimacy of corporal punishment helps eliminate this problem.

209. Pollard, *supra* note 128, at 577; see also David Orentlicher, *Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children*, 35 HOUS. L. REV. 147, 149 (1998) (arguing that our continuing "tolerance of corporal punishment" leads us to "undervalue children").

acceptable component of a romantic relationship. I am not suggesting that battering of women is no longer a problem; of course battering of romantic partners continues in this country at profoundly troubling rates, and our legal institutions still have much work to do.²¹⁰ In general, though, our culture now considers a slap across the face or repeated swats to the backside completely unacceptable conduct, grounds for divorce, and so on, if perpetrated by a man against a woman.²¹¹ Precisely the same conduct is still considered acceptable if perpetrated by a parent against a child, even though children are, unlike adults, utterly without resources to defend themselves or escape from the situation. Violence begets violence, and spanking often escalates to more serious child abuse.²¹² A clear legal statement that it is unacceptable to use physical force against children will be an important first step in better protecting them.

One possible rejoinder here is the argument that children are, in fact, different from adults and, therefore, entitled to less protection. There are many things we allow adults to do to children in the name of discipline that they do not do to other adults—put children in a “time-out,” for example, or take away a favorite toy.²¹³ Parents unquestionably have the right to use discipline to try to guide their children to a responsible and productive adulthood. In light of the well-documented harms caused by spanking,²¹⁴ however, that right should not encompass the right to use physical force. Indeed, many of the justifications we hear to rationalize spanking children—to teach children to defer to their “superiors” (their parents) or to punish them for failing to fulfill their obligations or for engaging in “inappropriate behavior”—are eerily reminiscent of the justifications we used to hear to rationalize physical abuse against women.²¹⁵

210. See, e.g., DEBORAH L. RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* 108 (1997) (“[D]espite recent improvements, the individuals most responsible for the persistence of domestic violence—batterers and law enforcement officials—still tend to minimize its significance, blame victims for its frequency, and discount their role in its solution.”).

211. See generally GORDON, *supra* note 171, at 251 (noting that “[w]ife-beating is now not only illegal but also, to a majority of Americans, shameful”).

212. See Pollard, *supra* note 128, at 621–22 (describing research showing that “spanking is a precursor to child abuse”).

213. Of course, imprisonment by the state can be viewed as the ultimate “time-out.”

214. See Pollard, *supra* note 128, at 601–27 (documenting the harms caused by spanking, including the developmental and psychological damage it does to children, and describing research showing that physical punishment is not an effective form of discipline). For other discussions of some of the harmful consequences to children associated with corporal punishment, see PHILIP GREVEN, *SPARE THE CHILD: THE RELIGIOUS ROOTS OF PUNISHMENT AND THE PSYCHOLOGICAL IMPACT OF PHYSICAL ABUSE* 122–212 (1990), and MURRAY STRAUS, *BEATING THE DEVIL OUT OF THEM: CORPORAL PUNISHMENT IN AMERICAN FAMILIES AND ITS EFFECTS ON CHILDREN* 67–146 (2001). Straus also argues that we must view the hitting of children and the hitting of wives as equivalent problems. See STRAUS, *supra*, at xvii–xx.

215. See GORDON, *supra* note 171, at 250–88 (explaining how male violence was an “assertion of dominance” and that wife-beaters were “[a]ccustomed to supremacy, [and]

Another potential criticism of my proposal is that it is in a sense antidemocratic: we should not use the law as a blunt instrument to prohibit conduct that a majority of Americans still believes to be acceptable. This criticism has power; it is important to recognize that police and prosecutors could underenforce a truly unpopular law and that citizens could reject the law in criminal cases through acts of jury nullification.²¹⁶ In a practical sense, I am hopeful that such a law could actually pass and be workable. Even though most people spank, I think most legislators and law-enforcement officials would ultimately acknowledge that it would be better not to spank, especially if confronted with all the expert evidence detailing the harms of corporal punishment.²¹⁷ In a more theoretical sense, I believe this is simply one of those times where the criminal law needs to be aspirational.

B. A THEORETICAL REORIENTATION

1. A Reorientation Toward the Home

Although America is obsessed with protecting our children, we persist in viewing “stranger danger” as the greatest threat to their well-being. In absolute terms, of course, this perception is entirely inaccurate. As described above in Part III.A.3, children face a far greater risk of death at the hands of their parents than at the hands of a stranger.²¹⁸ If we are serious about reducing the risks children face, we simply must turn our attention to how best to minimize the dangers they face at home.

Our obsession with stranger danger has another troubling implication. By suggesting that strangers pose the greatest danger to our children, we

acculturated to expect service and deference from women”); see also MYERS, *supra* note 22, at 167 (“If you are among the majority of Americans who believe hitting children is necessary for discipline, keep in mind that not so long ago some men thought it necessary to hit women for discipline.”). Myers makes powerful arguments in favor of outlawing corporal punishment that are well worth reading. See *id.* at 166–69.

216. See generally Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000) (“[A]s legislators expand liability for date rape, domestic violence, and drunk driving, police become less likely to arrest, prosecutors to charge, jurors to convict, and judges to sentence severely.”).

217. Although a full discussion of the best form of such legislation is beyond the scope of this Article, there are ways the legislation could be drafted that might increase its viability. Although I would strongly support outlawing any form of corporal punishment, if an incremental approach would be viewed as preferable, perhaps force above and beyond an open-handed slap could be prohibited as a first step. That would allow for the kind of traditional spanking that most parents consider acceptable; presumably, many parents, even those in favor of corporal punishment, would draw the line at hitting their children with an object or punching and kicking them. I am indebted to Carissa Hessick and Kay Levine for their very helpful insights on this section of the Article.

218. See also JENKINS, *supra* note 4, at 10. Jenkins argues that between 1980 and 1994, only six percent of the children under the age of twelve who were murdered in the United States were murdered by a stranger. Only three percent of the crimes involved a murder coupled with a sex offense.

minimize the harms that are inflicted when children are victimized by someone they love. Carissa Hessick makes some powerful observations in this regard. First, victims of family violence may be more “likely to feel guilt or confusion about the violent incident” than victims of stranger violence.²¹⁹ Although Hessick focuses here on adult rather than child victims, this possibility applies with equal force in the context of children. In attempting to overcome the trauma that they have endured, child victims of physical or sexual abuse often have to cope with the feeling that perhaps they “deserved” the abuse.²²⁰ “[A]buse may teach the child that he or she is helpless (i.e., to avoid the abuse), inadequate (i.e., to mount a successful defense), and loathsome (i.e., to deserve such maltreatment) — lessons the individual will continue to apply later in life.”²²¹ Certainly victims of stranger violence may have some of the same reactions, but the fact that the abuse is inflicted by a caretaker, the very person who is supposed to ensure a child’s safety, makes the abuse particularly traumatic.²²²

Further, in situations where parents intentionally harm their children, we must recognize that the existence of the parental relationship makes the conduct *more* blameworthy, rather than less so.²²³ We have multiple obligations to our children that simply do not extend to strangers or acquaintances—in the most basic terms, to provide them with food, shelter, and clothing and to protect them to the extent we can from the harms the world may impose.²²⁴ When we afflict affirmative harm on a member of that very small class of individuals whom we have an affirmative obligation to protect, the betrayal of trust is especially reprehensible. In cases of intentional harm like murder and rape, we should consider the existence of a parental relationship an aggravating factor rather than a mitigating one.

219. See Carissa Byrne Hessick, *Violence Between Lovers, Strangers, and Friends*, 85 WASH. U. L. REV. (forthcoming 2007) (manuscript at 57, available at <http://ssrn.com/abstract=984307>).

220. See Mark Chaffin et al., *Treating Abused Adolescents*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT 119, 124–25, 133 (1996) (discussing the “social stressor that may arise from the tendency for many adolescents to be exquisitely sensitive to the possibility that peers and schoolmates might discover the abuse and view them as responsible, disgraced, and stigmatized”).

221. John Briere, *A Self-Trauma Model for Treating Adult Survivors of Severe Child Abuse*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT, *supra* note 220, at 140, 143.

222. See Jacqui Hetherington, *The Idealization of Women: Its Role in the Minimization of Child Sexual Abuse by Females*, 23 CHILD ABUSE & NEGLECT 161, 167 (1999) (“Degree of closeness between the victim and perpetrators and thus heightened sense of betrayal, is widely reported as predictive of increased trauma.” (citation omitted)).

223. See Hessick, *supra* note 219 (manuscript at 58) (“[V]iolent crimes that occur within the context of close personal relationships may involve a breach of trust and feelings of betrayal that would not arise had the same crime been committed by a stranger.”).

224. See, e.g., David A. Hyman, *Rescue Without Law: An Empirical Perspective on the Duty to Rescue*, 84 TEX. L. REV. 653, 655 (2006) (“Absent a limited number of specific exceptions, there is no duty to rescue . . .”).

2. The Charging Versus Sentencing Distinction

An additional way in which we must reorient our thinking is to move away from the presumption that prosecution inevitably leads to incarceration and that therefore we must avoid prosecution in the first instance to ensure that parents who beat their children are not filling the nation's jails. Let us assume for a moment that a reader of this Article is persuaded that perhaps the criminal law currently is treating parents too generously but still believes that we must give the existence of a parent-child relationship some consideration when police, prosecutors, and judges evaluate cases. If that is true, I believe such considerations are more appropriately taken into account at the time of sentencing, rather than at the point in the process where the state makes the decision about whether to file charges at all.²²⁵

There are a multitude of factors that we take into account at the time of sentencing that ordinarily do not preclude a decision to charge the offender in the first instance. The seriousness of a defendant's criminal record is one example; we would not decline to charge a violent robber on the ground that it was his first offense, but the absence of a criminal record might well result in a lesser sentence. Remorse over committing the crime is another example; a judge might well consider the fact that a defendant truly regrets committing a crime when deciding whether to impose the maximum sentence, but a prosecutor probably would not when making the charging decision.

That is because sentencing offers us the most appropriate opportunity to incorporate the important values of compassion, forgiveness, and mercy into the criminal justice system. Take the example of a defendant who has raped his young daughter on multiple occasions, rather than selecting a stranger as his victim. Why should the fact of that relationship be taken into account, if at all, at the time of sentencing rather than the time of charging? In practical terms, much more is known about the defendant's background, the family's situation, and the circumstances of the crime at the time of sentencing. In moral terms, choosing to charge the defendant makes the normative statements that the defendant has engaged in conduct worthy of societal condemnation and that protecting a child relative is just as important as protecting a child who is a stranger to his or her attacker.

C. THE QUESTION OF MOTHERHOOD

As referenced above, it is impossible to discuss parental violence without giving some special attention to the question of motherhood, for a number of reasons. Greater use of the criminal justice system to protect children will undoubtedly have a disparate impact on women. If

225. I discussed the charging-versus-sentencing distinction more extensively in a prior article. See Collins, *supra* note 121, at 849-52.

prosecutions increase, women are more likely than men to bear the brunt of that change simply by virtue of the fact that they are more often the custodial parent.²²⁶ Further, women are typically—and regrettably—held to a higher standard of care in regard to childrearing than men, and prosecutors may accordingly act more aggressively against mothers because of their own biases about mothering.²²⁷

The prevalence of violence against children has always posed “a problem for feminist theory.”²²⁸ This is, in part, because “[d]efending women against violence is so urgent that we fear women’s loss of status as political, deserving, ‘victims’ if we acknowledge women’s own aggressions.”²²⁹ Some feminist scholars have, of course, addressed the issue of child abuse, but many of these terrific articles follow a similar pattern: they begin by acknowledging the difficulties child abuse poses for feminists but then limit their discussion of those difficulties to cases in which the mother is also being battered herself.²³⁰

There are really two separate issues here. The first is the issue upon which feminist scholars have focused: what do we do about cases of child

226. See, e.g., Nancy Erickson, *Battered Mothers of Battered Children: Using Our Knowledge of Battered Women to Defend Them Against Charges of Failure to Act*, in 1A CHILDREN AND FAMILIES, ABUSE AND ENDANGERMENT 197, 199 (Sandra Anderson Garcia & Robert Batey eds., 1991) (“[B]ased on sheer numbers alone, one could predict that women will be prosecuted for this category of failure to act more frequently than men.”).

227. One commentator has argued that “society particularly expects that the mother will be the child’s protector” and that “[t]he mother is expected to suppress any individual identity or needs of her own in order to serve and protect the needs of her child.” Michelle Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 587 (1998); see also Becker, *supra* note 189, at 15 (“There is a profound tendency in our culture to blame mothers (not fathers) for all problems children face (and all problem children).”). Elizabeth Rapaport wrote a fascinating article about motherhood and infanticide, arguing that both the media and legal scholarship “amplify the role of women and mute the role of men,” in part because we are “beguiled” by “the mad women and desperate girl stereotypes.” Elizabeth Rapaport, *Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth*, 33 FORDHAM URB. L.J. 527, 529 (2006).

228. See Ashe & Cahn, *supra* note 198, at 75; see also WILCZYNSKI, *supra* note 114, at 12 (“[F]eminist authors have on the whole largely side-stepped the issue of women’s violence towards their children”); Becker, *supra* note 189, at 13 (“Child abuse is an awkward topic for feminists and feminism.”). Becker further notes that “one general problem child abuse poses for feminism is that all strands of feminism tend to focus on women and their needs under the current social and legal order, rather than on women as beings who abuse power and fail to protect their children.” *Id.* at 14.

229. Linda Gordon, *Feminism and Social Control: The Case of Child Abuse and Neglect*, in WHAT IS FEMINISM? 63, 68 (Juliet Mitchell & Ann Oakley eds., 1986). For an illustration of the practical impact of this phenomenon, see Hetherton, *supra* note 222, at 164, describing the angry response of some feminist groups to the first conference on female sexual abusers. Hetherton suggests that “the official line from many feminist organizations was that to address the issue [of sexual abuse perpetrated by women] at all was to draw attention away from the fact that child sexual abuse is about the exercise of male power.” *Id.*

230. For examples of this phenomenon, see Ashe & Cahn, *supra* note 198, at 87–90; Becker, *supra* note 189, at 31; Dohrn, *supra* note 10, at 3–4; and Murphy, *supra* note 40, at 745.

physical or sexual abuse that occur in families where the mother is also being abused? The second and overlooked issue is the more difficult: what do we do about cases in which children are abused but the mother is *not* herself a victim of abuse? Should the status of motherhood make a difference in those cases as well?

Let us begin with the first scenario. There are two different potential bases of liability for mothers: the first is when the mother herself affirmatively inflicts physical or sexual injury on the child; the second is when the state charges the mother not because she personally inflicted any injury, but because she failed to protect the child from being abused by someone else, most typically her male partner. The fact that a mother is suffering from abuse is most clearly relevant in the failure-to-protect cases.

The fact that a mother is charged at all in the failure-to-protect scenario is a powerful example of the “mother-blaming” bias that permeates not only our legal institutions, but also our cultural norms about parenting that I discussed in the first Part of this Article. “[M]others are expected to be much better and more powerful parents than fathers, always putting their children’s needs above their own and protecting their children from all harm.”²³¹ Those expectations obviously are particularly difficult to fulfill in cases where both mother and children are being battered because there may be few available options open to these women to help them remove their children from the abusive situation. They may correctly perceive that attempts to leave will escalate the violence.²³² They may have no economic options in terms of being able to find housing or a job that will provide sufficient income to support a family.²³³

Therefore, we must partner any attempts to hold mothers accountable for their failure to protect with efforts to make it more viable for women to leave abusive partners—for example, by providing more funding for shelters, job training, and child-care resources.²³⁴ It is simply unrealistic to demand that a woman leave her home to protect her children if she knows that leaving will result in homelessness, hunger, or increased violence. That

231. Becker, *supra* note 189, at 15; see also JANE SWIGART, THE MYTH OF THE BAD MOTHER: THE EMOTIONAL REALITIES OF MOTHERING 6 (1991) (“[W]e live in a society that simultaneously idealizes and devalues the mother.”); Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 822 (2000) (“Cultural middle-class norms expect all women to be primarily responsible for their children. The criminal justice system supports this norm by criminalizing the abusive and neglectful behavior of parents, penalizing mothers particularly harshly.”).

232. See Becker, *supra* note 189, at 19 (noting that women are sometimes murdered after leaving an abusive spouse).

233. See *id.*

234. See *id.* at 31–32 (urging the provision of stronger “safety nets” for women in abusive situations); see also Gordon, *supra* note 229, at 69 (“Good social policy could address the problem of wife beating in part by empowering women to leave abusive situations, enabling them to live in comfort and dignity without men . . .”).

being said, however, even women who are themselves the victims of abuse should face some consequence if their failure to protect results in the death of, or serious injury to, their children. Young children are simply helpless to protect themselves from harm; that responsibility must fall on the shoulders of those adults in the position to be a child's only lifeline.²³⁵

There should be some limitations to liability, however. First, we should limit liability to those circumstances where a parent had prior knowledge of past abuse and had the practical opportunity to seek help, such as access to a telephone to contact law-enforcement authorities. Second, in many instances, parents who fail to protect in a case involving a fatality should not face the same homicide charge as the actual killer but, instead, should be charged under a separate statutory scheme criminalizing a failure to protect and carrying lesser penalties.²³⁶ A separate statutory scheme would better reflect that there is a meaningful moral distinction between actually inflicting the fatal blows and, for example, making the mistake of leaving a child alone with an individual who has been abusive in the past. Finally, a woman's history of being abused should certainly be a relevant consideration for a judge at the time of sentencing.

What about cases in which the mother is being battered and she is also affirmatively battering her children? Should she escape liability by virtue of her own abuse? One commentator, for example, has argued that "if the woman can show that the gendered nature of her oppression helped to construct her criminal behavior, then that oppression should act as a mitigating factor to reduce her crime."²³⁷ She further suggests that a woman who "abused her child in response to her abuse" should be entitled to a "provocation justification" type of defense and should be convicted of a crime other than child abuse, such as "assault by socially justifiable provocation."²³⁸ Finally, the punishment for a conviction on such an assault charge should consist of forced rehabilitative therapy rather than imprisonment.²³⁹

These suggestions are problematic for a number of reasons. First, the sentencing suggestion makes no reference to the idea that the severity of any sentence imposed should vary, at least in part, according to the severity of the abuse inflicted. Surely imprisonment should at least be considered for a

235. As Mary Becker has written, "[T]he assumption should be that the adult who was not literally a hostage—not literally coerced at every available second—*could* have acted to end abuse," at least by picking up the phone and calling 911. Becker, *supra* note 189, at 21. Becker adds, "No matter how weak the mother, she is in a much better position than the child to prevent abuse and owes a duty of care to her children." *Id.*

236. I say "in many instances" because presumably there may be some cases where the more passive parent is just as culpable as the actual abuser by providing active encouragement or a weapon or the like.

237. Plank, *supra* note 8, at 107–08.

238. *Id.* at 108–09.

239. *See id.* at 110.

mother whose act of battery left a child permanently brain damaged or paralyzed, for example. The mother's own abuse simply cannot be the only factor in the sentencing calculus; it is instead one of many relevant factors. In addition, taken to its logical extension, the idea that abuse occurring in response to past abuse is less blameworthy could also be extended to men who claim justification for abusing their wives by pointing to their own childhood experiences of abuse, either as a recipient or an observer. The idea that we should allow men who are battering their wives to claim their assaults were "socially justified" is profoundly troubling, and it would have the potential to undercut years of progress on the issue of domestic violence.

So what should we do when a battered woman herself batters a child? The fact of the battering surely needs to be taken into account at the time of sentencing. However, it should not preclude the decision to *charge* in the first instance—charging makes the normative statement that battering a child is unacceptable no matter what the circumstances and that protecting children from physical harm is one of the core values of our criminal justice system. Adjusting the sentence in light of the battering reflects our compassion and potentially opens the door to some creative sentencing options.²⁴⁰

The same general ideas hold true in those forty to sixty percent of child abuse cases where there is no evidence that the woman is being abused and yet she is abusing her own children. First, any assertion that the offender is not being abused should not automatically be taken at face value. Lawyers and law-enforcement officers should try to understand the realities of the lives of women they encounter through their work in the criminal justice system and be sensitive to the possibility that sometimes abuse is deeply hidden from public view.²⁴¹ But what about the scenario where there is no abuse? Should the fact of the offender's motherhood still be relevant? I suggest that the offender's status as a *parent* is relevant, but we must be vigilant to ensure that mothers are not held to a higher standard or penalized more harshly than fathers. The fact that it is a parent who has physically or sexually abused a child indeed makes the conduct more blameworthy, rather than less, because of the parent's special position of trust and responsibility. However, the fact that it is a mother rather than a father who is committing the abuse should not matter—treating mothers as more culpable than fathers contributes to the problems of idealizing

240. For example, although this is a complex issue, as part of her sentence perhaps the female offender could be ordered to stay away from her own batterer, thereby providing her a legally sanctioned excuse to exit. This option is only viable to the extent we are committed as a society to providing more resources to support women who are leaving abusive situations.

241. See generally Marie Ashe, *Postmodernism, Legal Ethics, and Representation of "Bad Mothers,"* in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 142, 152–53 (Martha Albertson Fineman & Isabel Karpin eds., 1995) (discussing how the "underlying realities of mothers' lives" sometimes remain deeply "private" and "hidden").

motherhood and reducing women to nothing more than their socially constructed role as mothers.²⁴²

We must acknowledge that female perpetrators do exist and hold them accountable when they inflict harm on their children. To deny women's agency in this context, to view them always as passive and innocent actors in the culture of violence that surrounds some of our children, is "sexist, not feminist."²⁴³ Failing to hold those women who abuse children accountable, even though not suffering from abuse themselves, "subordinat[es] the interests of children to those of women," thereby putting children at risk of further abuse and leaving them utterly alone.²⁴⁴ That is not to say that issues of class, poverty, and gender bias do not contribute to the problem of child abuse; of course they do, and we must address those issues.²⁴⁵ But we must draw a bright line around the idea that child homicide and child rape can never be acceptable, even though we might be able to trace the genesis of the offender's criminal conduct to her own experiences with oppression or violence. Acknowledging the fact that some women are themselves aggressors should not undermine their deserving status as victims in so many other contexts; it simply reflects the wider reality of women's experiences.

V. CONCLUSION

It is certainly true that awareness of and concern about the physical and sexual maltreatment of children is increasing in this country, but this Article suggests that our concerns about that maltreatment are largely misguided. Instead of focusing on the place where children face the most danger, the home, we have directed our concerns outward and focused on the notion of stranger danger. If we are serious about protecting children, we must reorient our thinking toward the home and explore new options to hold the offenders accountable who victimize our children. We must also reorient our thinking away from our idealized notion of the parent-child relationship: our belief that parents will do right by their children without the intervention of the criminal law. As the statistics discussed in this Article demonstrate, parental love is always not enough to protect our children from violence.

242. See Ashe & Cahn, *supra* note 198, at 86 ("Popular simplistic and reductive interpretations of abusive mothers may constitute attempts by parents to drive away a recognition of their own tendencies toward verbal and physical violence against children.").

243. Kay L. Levine, *No Penis, No Problem*, 33 FORDHAM URB. L.J. 357, 385 n.125 (2006). See generally Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE, *supra* note 24, at 59, 64 (discussing how it is "so difficult" for us "to see both agency and oppression in the lives of women").

244. Levine, *supra* note 243, at 385 n.125.

245. See GUGGENHEIM, *supra* note 8, at 185 (noting the tendency of "public debate" to "ignore[] or understate[] the evidence suggesting a correlation between abuse and neglect on the one hand and poverty on the other").

In many ways, the reorientation urged by this Article parallels the developments that have already taken place in the fight against violence directed at women. Activists, in large part, successfully have convinced law enforcement in particular and society in general that wife abuse and marital rape are examples of *criminal* conduct that demand redress through the criminal justice system.²⁴⁶ When it comes to the battering and rape of children, however, we persist in viewing that conduct as exemplifying mental illness that requires “social services and psychological treatment,” rather than legal sanctions.²⁴⁷ Social services and psychological treatment may well play an important role in healing victims, offenders, and their families, but the criminal justice system must play an important role, too. We will not make meaningful progress against the problems of the physical and sexual abuse of children until we begin to view parental battering as criminal conduct that requires some legal sanction by the state in order to fully validate the lives of our youngest and most vulnerable victims.

246. See Pleck, *supra* note 36, at 49–50 (documenting reforms against family violence throughout American history); see also Corrigan, *supra* note 84, at 271 (describing the efforts of feminists to “counter pervasive assumptions that rape was the product of a diseased mind”).

247. Pleck, *supra* note 36, at 49–50.